THE DOCTRINE OF CONTINUOUS VOYAGES IN THE EIGHTEENTH CENTURY

I

It would not be possible to understand, much less to state clearly, the origin, nature, and extent of the so-called Doctrine of Continuous Voyages without explaining, even in a succinct manner, the causes that contributed to the statement of this famous principle. There is hardly anything in the field of social conceptions that is not in some way or other connected with the past. For this reason when we want to ascertain the principles that obtained in a period gone by it is imperatively necessary that our inquiries should start from an age even more remote, so that the light of history may clear the paths that we intend to explore. During the middle of the eighteenth century nothing was heard of the doctrine which we attempt now to expound; it was only at the end of that century that its first manifestations appeared. But the examination of the navigation laws of the times and of the principles of international law that regulated the intercourse between neutrals and belligerents would at once suggest that the prohibition which the doctrine embraced is dependent on or complementary to the so-called "Rule of war of 1756."

Long before the eighteenth century the colonizing Powers of Europe had restricted the trade of their colonies to vessels of their own country. They did not allow supplies to be carried to them in foreign ships,[1] and they prohibited in the same manner the exportation of colonial produce except by means of national vessels. The European Powers upheld strenuously this system of "the closed door," for they thought that on its adherence depended entirely, or mainly at least, the value of their colonial possessions. In fact freedom of navigation during the eighteenth century did not exist. At the outbreak of the war between England and

[1] England had provided for the monopolization of her colonial trade by the Navigation Act of 1651.

France in 1756, the latter Power, finding herself disabled, on account of her relative weakness upon the sea, from carrying on her colonial trade, decided to relax her monopoly in favor of the Dutch, who were then neutral. Dutch merchantmen were permitted, under certain restrictions, to carry on the trade between France and her dependencies, but other neutral traders continued to be excluded. The English prize courts thereupon condemned all Dutch vessels engaged in this traffic, together with their cargoes, on the ground that such vessels had incorporated themselves in the merchant service of the enemy by carrying the trade which, prior to the war, was monopolized by French ships. In fact "they were considered as made French by adoption." This limitation of the neutral commerce has generally come to be known as "The Rule of War of 1756," because the cases that demanded its application occurred then for the first time.

The reasons on which the rule is founded were brilliantly given by Sir William Scott when it was his duty to deliver his judgment in *The Immanuel*. He expressed himself as follows:

> The general rule is, that the neutral has a right to carry on, in time of war, his accustomed trade to the utmost extent to which that accustomed trade is capable. Very different is the case of a trade which the neutral has never possessed, which he holds by no title of use and habit in times of peace, and which, in fact, can obtain in war by no other title, than by the success of the one belligerent against the other, and at the expense of that very belligerent under whose success he sets up his title; and such I take to be the colonial trade, generally speaking * * * It cannot be contended to be a right of neutrals, to intrude into a commerce which had been uniformly shut against them, and which is now forced open merely by the pressure of war; for when the enemy, under an entire inability to supply his colonies and to export their products, affects to open them to neutrals, it is not his will but his necessity that changes his system; that change is the direct and unavoidable consequence of the compulsion of war.[2]

The principle embodied in this rule was considered to be a part of the law of nations, and as such it was enforced by the English prize courts during the latter part of the eighteenth century. This statement would seem to be somewhat vague, but it must be borne in mind that it is hardly possible to venture a more definite assertion in this connec-

[2] 2 C. Rob. 186.

tion without entering into a detailed examination of the usages then prevailing with regard to the rules of war on sea. It is of course quite likely, as has been observed by an able authority,[3] that after an inquiry into the maritime customs of a given age, the international rules founded in them may, in general, be considered to be unsatisfactory, for the laws of war on sea embodied the conduct of an earlier period and such conduct might not be in harmony with the actual times, and also because they may find their source in the *ex parte* ordinances of a given government.

It is needless to say that the application of the rule was bound to produce some kind of hardships on neutral traders who would lose an opportunity for the opening offered during war time. The interests of neutrals and belligerents are necessarily divergent in such cases, and hence it was natural that the conduct of England should give rise to a considerable number of disputes. Nothing, however, was settled by any convention respecting the lawfulness of neutral commerce with the colonies of a belligerent state. The rule laid down in 1756 received new impetus at the outbreak of the war of 1793, for England then issued stringent regulations in connection with the carriage of the colonial trade of her enemy. A loud protest was immediately heard from those neutral states whose merchants had been engaged in the colonial traffic. Possibly owing to this, the English government issued milder instructions in January, 1794. They were to the effect that "such vessels as were laden with goods the produce of the French West India Islands, and coming directly from any part of the said islands to Europe" were to be seized. Nothing was said in the royal order respecting the voyage of a neutral vessel from Europe to the French colonies or of the traffic between the West Indian islands and the United States. These instructions, therefore, constituted a relaxation of the rule of war, but it is clear that the effect of this municipal regulation could not be held to preclude this country from asserting, to its full extent, the principle contained in the rule in some subsequent period. For it is to be kept in mind that the prohibition of carrying on the trade of the colony by a neutral state was considered to be a principle of the law of nations, and hence this could not possibly be affected by the municipal regula-

[3] Sir John Macdonell.

tions of any one Power. International law cannot be altered by the *ipse dixit* of one of the members of the family of nations.

A further relaxation of the rule with which we are now dealing was introduced by the royal order of January, 1798.

It directed the bringing in for adjudication of "vessels laden with the produce of any island or settlement of France, Spain or Holland, and coming directly from any port of the said island or settlement to any port in Europe, not being a port of this Kingdom or of the country to which the vessel, being neutral, should belong." That is to say, neutrals were allowed to bring the produce of the hostile colonies directly to ports of their own country, or to England.

It should here be observed that the validity of the Rule of War of 1756 was seriously threatened by the combination of the continental Powers who subscribed to the so-called Armed Neutralities of 1780 and 1800; but the legitimacy of the practice was nevertheless upheld by the English courts. Finally, the lack of success on the part of the continental states to guarantee the enforcement of the provisions issued may fairly be taken as the triumph of the British contentions.

II

When neutral traders saw themselves enabled to traffic, free from the interference of the English courts by virtue of the royal orders which we have noted, from the hostile colonies directly to their own ports or to England, in the event of a war to which this Power was a party, they attempted to find a way for obtaining absolute freedom of trade with the colony, and thus defeat the royal orders that granted them the indulgence by relaxing the rigor of the rule of 1756. Their purpose was to carry trade also between the colony and the mother country, because in this latter place better prices could be secured. They found an indirect means opened to them for the attainment of their ultimate end. Thus they might proceed to some port of their country and then reexport the goods in the same or different vessels to a belligerent port. The traders of the United States were in a peculiarly favorable position for adopting this line of action, when it was intended to carry the trade of the French, Spanish, or Dutch colonies to their respective mother

countries during the war between England, on the one hand, and France, Spain, and Holland on the other, so far as the trade related to the colonies in the New World.[4]

It is evident that England, in receding from the strict application of her belligerent rights in connection with the carriage of the colonial trade, did not intend to allow the colonial produce to find its way into the hands of her enemy. If such cargoes were permitted to be re-exported from the neutral ports to the hostile country, then her enemies would hardly experience any serious effect from the war with regard to their colonial trade. If England's intentions had not been to diminish in this way the resources of the enemy, as she was entitled to do by the law of nations, it would have been a better plan to allow neutrals to conduct the colonial trade in the most open manner in a direct and single voyage; for if this had been the case, "both the terms of the voyage being hostile, and the papers put on board at the port of shipment, being derived from an enemy, or from agents in the hostile country, the suspicion of a visiting officer would naturally be wide awake; and a strict examination, even though the vessel should be brought into port for the purpose, would, generally speaking, be justifiable and safe. The alleged right of property in a claimant of the cargo, might also in such a case be examined up to its acquisition in the hostile country, by the light of the evidence found on board." [5]

In fact, no other was the intention of the British Government, as may be conceived by the attempt to incorporate the principle contained in the royal instructions in the form of a conventional agreement in the Jay Treaty entered into between England and the United States. It was stipulated in the project of the treaty that the products of the West Indies that had been imported into the United States should not be re-exported from the country during the period of hostilities. But at the ratification of the treaty by the United States this article was excluded.

It is, therefore, evident from what has been said that the spirit of the royal orders was to the effect that there should be a *bona fide* importation of the colonial produce into the neutral country that was to benefit by the relaxation of the principle, that is to say, that the voyage of the

[4] Wharton, International Law of the United States, 3388.

[5] Stephen, War in Disguise, 3rd edition, p. 51.

vessel engaged in such a trade should actually and not "colorably" originate or terminate in the neutral port or in England.

In order duly to enforce the royal instructions and thus defeat the fraudulent plan adopted by the neutral traders, it would have been necessary to institute a very severe inquiry, not because of any difficulty in the interpretation of the royal orders, since their meaning was quite clear, but simply on account of the heavy burden imposed on the captors to prove the *mala fides* of the traders. This would naturally embrace an inquiry into their state of mind—a process which has never been an easy one, for "the devil himself," according to a medieval judge, "knoweth not the heart of man." Only by means of external acts would it have been possible to raise the presumption of the illegality of the voyage and thus make the vessel and her cargo liable to confiscation. It is of importance to remember that a captor at sea could hardly have the opportunity or the means of ascertaining the real truth about a dubious case. There cannot be any hard and fast rules for disclosing from external facts the intention of a certain person. Accordingly it is not difficult to believe that the fraudulent practice went on undetected for some time before it came to the cognizance of the courts; for the visiting officer would in most cases be satisfied with the presentation by the captain of the vessel of a certificate purporting what was true, namely, that the vessel was sailing from a neutral port. In this way the first part of the voyage remained ignored. It is possible, however, that the practice may have been incidentally noticed by the courts of law in the course of their procedure, but, so far as we know, no steps were taken to check the abuse until, by the happening of an accident, a vessel and her cargo were brought in for adjudication by the courts.

Towards the end of the century, while the war was still raging, a British vessel overhauled and examined an American ship carrying a cargo of sugar from Havana to Charleston. As it appeared that both ship and cargo belonged to neutral owners and that the vessel was bound for a neutral port, where the voyage was to end, she was immediately released. As a matter of fact, this vessel was engaged in the forbidden trade, according to the spirit, though not the letter, of the royal orders. She proceeded to Charleston and after a few days left that port with the same cargo for a European market. She took a new set of papers both

from the owners and the custom house authorities, purporting that the cargo had been taken on board at Charleston. During this later voyage the ship was again visited by a British cruiser, which found her papers to be entirely correct. She was nevertheless seized, for the simple reason that the visiting officer was no other than the person who examined her during the earlier part of the voyage to Charleston. He was able to identify both ship and cargo as the very same ones which he had lately examined and released. The Lords Commissioners of Appeal for Prize Causes found the facts clear and convincing, and hence condemned the property. It was held in the case that "the touching at a neutral port, merely for the purpose of colorably commencing a new voyage, and thereby eluding the respective rule of law, in a branch of it not relaxed by the royal instructions, could not legalize the transaction; but that it ought nevertheless to be considered as a direct and continuous voyage from the hostile colony to Europe, and consequently illegal.[6]

The proof in this case had been conclusive and there was absolutely no evidence on the part of the owners to contest the seizure, but no doubt cases arose in which the question would not be so clear, and then the decision, after an unsuccessful attempt to discover the intention of the traders, would be in their favor. Let us for the sake of clearness examine another case of this kind. We might also perceive the minute provisions and extraordinary care that may be taken by the traders in order to carry on their illegal plan and avoid condemnation as far as possible.

In June, 1799, an American ship took a cargo of sugar from Havana, a Spanish colony, to Marblehead, in America. There she took some cocoa, the produce of the Spanish settlement of La Guaira, which was transhipped from a schooner lying at Marblehead, under an original destination to Europe. A quantity of fish was included in her cargo, and then she sailed for Spain in August of the same year. She was seized and brought in for adjudication. The ship had been restored, and in respect of the cargo the question was heard as a case of further proof. Sir William Scott in his judgment came readily to the conclusion that the property, so far as it related to the fish, was not liable as it was

[6] Case of *The Mercury*, cited by Stephen, *op. cit.*, p. 53; Acton, Reports of Cases, Vol. 1, p. 51.

an American produce. With regard to the rest of the cargo the question of law that had been raised was whether a neutral who is not allowed to carry on the trade between the colony and the mother country would be permitted to do it circuitously. The learned judge pointed out that "an American has undoubtedly the right to import the produce of the Spanish colonies for his own use; and after it is imported *bona fide* into his own country, he would be at liberty to carry it on to the general commerce of Europe," the obvious inference being that if the importation is not *bona fide* and the cargo is subsequently exported to Europe, the property becomes liable on the ground that the transaction is illegal *ab initio*. But he ordered the restitution of the cargo on the ground that the goods in question had been landed and that the duties for them were paid in America, regarding these facts as general indications as to the test of *bona fide* importation into the neutral country, although he pointed out that it was not his business to say what was the universal test in such matters.[7]

Even so minute an inquiry into the propriety of the voyage was not enough in order to enforce the rule which the judges of the Court of Admiralty thought to be binding. They perceived the possibility of the adoption on the part of the traders of the fraudulent plan which we have described, which would do away with the prohibition of the royal instructions. But the very fact that the proof necessary for showing the voyage to be a continuous one was connected with the difficult question of intention, may be taken as an explanation for the continuance of this practice undetected, in spite of the decisions of the courts that the trade between the colony and the mother country in time of war, even in a circuitous manner, was illegal. For the traders had necessarily a loophole in the interpretation of the notion of intention. They could, and in fact did, take such measures as to be able, in certain cases, to "prove" that they had no *mala fides* when they first brought the colonial produce into their country.

Traders are said to have gone to the expense of landing their cargoes in America and then reshipping them in the same transport when it was intended to carry on the colonial trade to the mother country. This comparatively insignificant provision was naturally considered a cheap

[7] Case of *The Polly*, 2 C. Rob. 361.

precaution in case the vessel should be seized, as it would furnish some evidence of the intention to incorporate the goods in the general stock of the neutral market.

The payment of duties in the neutral port when the goods arrived there *in transitu* may appear *prima facie* a very expensive process, even if this fact alone would be considered as rendering the property free from condemnation. The state of a belligerent market may be very attractive, but if the trader had to undergo not only a certain amount of risk, but also the heavy expenses of a real importation into a neutral country for immediate re-exportation, it is possible, indeed probable, that he might be tempted to direct his energies to a more profitable channel. But fortunately for the American trader, this difficulty could be obviated, for he was allowed to pay the importation duties in a "colorable" manner. According to an Act of the United States of March, 1799, on the arrival of a cargo destined for exportation the trader was permitted to land the goods without being compelled to pay the duties; the only thing which he had to do was to give a bond whereby he agreed to pay the corresponding duties in the event of the goods not being re-exported. On their re-exportation the custom house authorities effected the usual clearances just as in the case of originally exported goods, and no mention was made of the bond that had been given. Such provision could not but help the trader to furnish himself with a very valuable *item* for the "proof" of his *bona fides* in case his cargo should be seized. It was evident that there could not be any difficulty in certifying that "the duties had been paid *according to law.*" We need not wonder that at the time the United States were accused of framing this Act with the principal, if not the only object, of shielding American vessels that were engaged in this illegal trade.

The trader had a much easier task when he came to consider the question of the insurance on the cargo. At first it seems to have been the practice to effect an insurance of the entire intended voyage, with the option of touching in an American port; but finally they came to adopt the much safer plan of insuring the two parts of the voyage as two different transactions—in the first part the neutral port appeared to be the final destination, and in the other it was the original starting place of the vessel. It would seem hardly relevant for our purpose to continue

the detailed account of the minute precautions adopted by the traders in order to show what they did not have, namely, an intention to incorporate the goods in the general stock of the country. Suffice it to say that in time the English courts came to consider the circumstances of the cargo and the payment of the duties as insufficient evidence of a *bona fide* importation into a neutral port.[8]

It was not until the beginning of the nineteenth century that Sir William Scott and Sir W. Grant dealt with the practice, condemning it in the most unequivocal language, the former in *The Maria*,[9] and the latter in *The William;* [10] and thus the theory was firmly established that in such cases the two voyages were in reality parts of one and the same transaction in which a forbidden cargo was taken to a forbidden destination.

III

The mere recital of the facts that brought the theory into existence would seem in itself a sufficient justification for its application in connection with the carriage of colonial trade to the mother country. It may perhaps be objected that the rule was a hindrance to neutral commerce and that consequently great hardships were placed upon traders; but the state of international law at the time with which we are dealing was such that it cannot be said that injustice was in any way inflicted on them by the belligerent who caused the enforcement of the doctrine, and therefore, as long as those circumstances continued, any condemnations under it cannot but be pronounced to have been perfectly legal. But whatever may be the opinion with regard to the application of the theory to colonial trade, it cannot be doubted that the principle embodied in the doctrine is sound in itself. It is hardly necessary to point out that the circumstances which called for the enunciation of the famous doctrine are not likely to arise again, for nearly all the members of the international family have long abandoned the practice of monopolizing their colonial trade, and, according to the Declaration of Paris of 1856,

[8] See the case of *The Enoch* and *The Rowena*, July 23, 1805, cited by Sir William Scott in *The Maria*, Roscoe, Reports of Prize Cases, Vol. 1, p. 497.

[9] Roscoe, *op. cit.*, p. 497.

[10] Roscoe, *op. cit.*, p. 505.

neutral vessels have the right to carry enemy property with the exception of contraband of war.

As it has not been our intention in this connection to enter into a speculation of the application of the doctrine during the nineteenth century, nothing will be said of the working of the theory with regard to contraband of war or of its later extension to blockade. Our purpose has been merely to lay down the principle underlying the doctrine and to make an attempt to recall the occasion that brought it into life. We have thus unavoidably perceived that it is impossible to deal with this part of the history of international law in the eighteenth century without entering into the economic state of affairs then prevailing. The interpretation of the laws of war on sea was, as we have already observed, based mainly on the usages of earlier times, which found their source in the municipal regulations of the maritime nations; and these *ex parte* ordinances were in their time primarily devoted to the solution of problems of an economic character. Hence it is that in a state of war neutral commerce was profoundly affected, and as a natural consequence of this fact there was a fierce struggle—purely economic—between the belligerents on the one hand and the neutrals on the other. In the history of the Doctrine of Continuous Voyages in the eighteenth century we are able to notice ample illustration of this neutro-belligerent conflict, as well as the plausible ingenuity adopted by the neutrals during the struggle and the subtle measures resorted to by the belligerent in order to counteract the tendencies of their enemies. The prevailing idea in this conflict was that the neutral should give way.

HARMODIO ARIAS.

SOME QUESTIONS OF INTERNATIONAL LAW IN THE EUROPEAN WAR [1]

VII

WAR ZONES AND SUBMARINE WARFARE

On February 4, 1915, the German Admiralty published the following decree:

> The waters around Great Britain, including the whole of the English Channel, are declared hereby to be included within the zone of war, and after the 18th inst. all enemy merchant vessels encountered in these waters will be destroyed, even if it may not be possible always to save their crews and passengers.
>
> Within this war zone neutral vessels are exposed to danger, since, in view of the misuse of the neutral flags ordered by the Government of Great Britain on the 31st ult. and of the hazards of naval warfare, neutral vessels cannot always be prevented from suffering from the attacks intended for enemy ships.
>
> The route of navigation around the north of the Shetland Islands, in the eastern part of the North Sea, and in a strip thirty miles wide along the Dutch Coast are not open to the danger zone.

Early in March it was announced that the zone had been extended to include the waters surrounding the Shetland Islands. This decree was intended by the German Government as a counter-measure against Great Britain, mainly on account of the decision of the British Government to treat as absolute contraband all cargoes of foodstuffs destined to Germany, which decision had been adopted by Great Britain in consequence of the German decree of January 31st placing the grain and flour supply of the empire under government control.

The war zone expedient, however, did not originate with the German Government. On the 4th of November, 1914, the British Government had issued an order declaring the North Sea to be a war zone, and warning neutral ships of the danger to which they would be exposed in trav-

[1] Continued from the January and April numbers of this JOURNAL.

ersing the waters embraced therein. The following is the text of the British order:

Owing to the discovery of mines in the North Sea, the whole of that sea must be considered a military area. Within this area merchant shipping of all kinds, traders of all countries, fishing craft, and all other vessels will be exposed to the gravest dangers from mines which it has been necessary to lay and from war-ships searching vigilantly by night and day for suspicious craft.

All merchant and fishing vessels of every description are hereby warned of the dangers they encounter by entering this area except in strict accordance with Admiralty decisions. Every effort will be made to convey this warning to neutral countries and to vessels on the sea, but from the 5th of November onwards the Admiralty announce that all ships passing a line drawn from the northern point of the Hebrides through the Faroe Islands to Iceland do so at their own peril.

Ships of all countries wishing to trade to and from Norway, the Baltic, Denmark, and Holland are advised to come, if inwards bound, by the English Channel and Straits of Dover. There they will be given sailing directions which will pass them safely, so far as Great Britain is concerned, up the east coast of England to Farne Island, whence safe route will, if possible, be given to Lindesnaes Lightship. From this point they should turn north or south, according to their destination, keeping as near the coast as possible. The converse applies to vessels outward bound.

By strict adherence to these routes the commerce of all countries will be able to reach its destination in safety, so far as Great Britain is concerned, but any straying, even for a few miles, from the course thus indicated may be followed by serious consequences.

The British war zone embraced substantially the whole of the North Sea; that of Germany embraced the whole of the English Channel and the territorial and open seas "around Great Britain." The effect of the British order was to render entrance to the North Sea between Iceland and the Hebrides dangerous, but it left open access from the south through the English Channel and Straits of Dover route, subject to directions which would be furnished to sailors by the Admiralty. The German proclamation left open the entrance to the North Sea except a strip along the English coast. A strip of marginal sea thirty miles wide along the coast of Holland was also left open. The two proclamations were therefore in a sense complementary. Both constituted a severe encroachment upon the rights of neutrals to navigate the high seas, but that of Great Britain was the less objectionable of the two.

The British proclamation contained no announcement of an intention to destroy enemy merchant vessels within the zone proclaimed by it, nor was there any threat that neutral vessels might be attacked by mistake on account of difficulties in verifying their nationality; moreover it was stated that neutral vessels desiring to enter the English Channel would be furnished sailing directions, which if followed would insure them against destruction by British mines. The German proclamation, on the contrary, announced that all enemy merchant vessels found in the German war zone would be destroyed even if it might not always be possible to save their crews, and that in consequence of the alleged misuse by British merchantmen of neutral flags neutral vessels were likewise exposed to destruction by German submarines.

The establishment by proclamation of war zones on the open seas is a new measure of maritime warfare, and is apparently not dealt with in any of the treatises on international law. The warships of belligerents have an unquestionable right to engage one another in battle and to prey upon the commerce of the enemy, anywhere on the high seas. In a certain sense, therefore, the outbreak of maritime war automatically converts all the open seas into a war zone. In the sense in which the term is here employed, however, a maritime war zone is a portion of the sea which on account of its geographical proximity to one or the other belligerent territories becomes by choice or necessity the actual theater of hostilities, and one in which the contestants find it necessary to exercise to the fullest extent their belligerent rights of capture and destruction. It is clearly the right and it may be the duty of a belligerent to notify neutrals that within such area actual hostilities are to be carried on, and to warn them that their vessels entering such waters will be exposed to the dangers incident to the conduct of naval operations therein. It is conceivable that the segregation of naval operations within certain defined areas may be of distinct advantage to neutrals by relieving their vessels from exposure to destruction or molestation on the seas at large. In the present case, however, it is otherwise, since both war zones embrace seas which must necessarily be traversed by merchant vessels in order to reach the ports of certain neutral countries. The effect has been to render neutral trade with such countries very difficult and to expose neutral vessels trading thereto to great perils.

While it is not unlawful for a belligerent to proclaim the existence of a war zone and to warn neutral vessels of the danger which they encounter in entering the waters thereof, there are manifestly limitations on the rights which he may exercise therein. The waters embraced within the zone remain, as before, a portion of the high seas, which neutral vessels have a lawful right to navigate, subject to no restrictions except such as they are under everywhere on the open waters of the ocean. Within such zone a belligerent has no greater rights of visit, search, capture or destruction in respect to enemy or neutral vessels than he has outside this area. In short, belligerents have no right to appropriate any portion of the high seas and close them to the navigation of neutral vessels, and it is very doubtful whether they may lawfully plant mines in them in such a way as to expose neutral ships to the danger of destruction while peacefully navigating the waters thereof. Sir Ernest Satow at the Second Hague Conference stated a principle that ought never to be disputed when he declared that the high seas constitute a "great international highway and that the right of neutrals to navigate those seas should take precedence of the transitory rights of belligerents to fight their battles thereon." It is to be regretted that the proposal of the British delegation at the Conference to prohibit the laying of mines in the open seas was not adopted.[2] In the absence of such a prohibition, both Germany and England have felt free to plant mines on an extensive scale within their respective war zones, and have thereby practically closed large portions of the open seas to navigation by neutrals.

The chief criticism of the German war zone proclamation of February 4th was directed against the announcement which it contained that all enemy vessels encountered in the waters embraced within the German zone would be destroyed even if it were not always possible to save their crews and passengers, and that in consequence of the alleged misuse by British merchant vessels of neutral flags, neutral vessels were likewise exposed to attacks intended for enemy ships. The publication of the German decree aroused considerable criticism, not to say indignation, in the United States, and on February 10th the

[2] See on this point the author's article in the January number of this JOURNAL, pp. 89–90.

American Government addressed a note to the Imperial Government calling attention to the "very serious possibilities of the course of action contemplated under the proclamation of February 4th" and requesting it "to consider before action is taken, the critical situation which might arise in case an American vessel should be destroyed or an American citizen should be killed." The German Government was further reminded that "the sole right of a belligerent in dealing with neutral vessels on the high seas is limited to visit and search, unless a blockade is proclaimed and effectively maintained." The note continued:

> To declare or exercise a right to attack and destroy any vessel entering a prescribed area of the high seas without first certainly determining its belligerent nationality and the contraband character of its cargo would be an act so unprecedented in naval warfare that this government is reluctant to believe that the imperial Government of Germany in this case contemplates it as possible.
>
> The suspicion that enemy ships are using neutral flags improperly can create no just presumption that all ships traversing a prescribed area are subject to the same suspicion. It is to determine exactly such questions that this government understands the right of visit and search to have been recognized.
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> * * * * * * * *
>
> If the commanders of German vessels of war should act upon the presumption that the flag of the United States was not being used in good faith and should destroy on the high seas an American vessel or the lives of American citizens, it would be difficult for the Government of the United States to view the act in any other light than as an indefensible violation of neutral rights which it would be very hard indeed to reconcile with the friendly relations now so happily subsisting between the two governments.
>
> If such a deplorable situation should arise, the Imperial German Government can readily appreciate that the Government of the United States would be constrained to hold the Imperial German Government to a strict accountability for such acts of their naval authorities and to take any steps it might be necessary to take to safeguard American lives and property and to secure to American citizens the full enjoyment of their acknowledged rights on the high seas.

In conclusion, the hope was expressed that the German Government would "give assurance that American citizens and their vessels will not be molested by the naval forces of Germany otherwise than by visit and search, though their vessels may be traversing the sea area delimited in the proclamation of the German Admiralty."

Similar protests against the German war zone decree were also made by the governments of various European neutral Powers, notably those of Italy, The Netherlands, and Greece.

On the same day (February 10th) a note was addressed to the British Government in regard to the alleged order of the British Admiralty of January 31st authorizing the use of neutral flags on British merchant vessels, presumably for the purpose of avoiding recognition by German naval commanders.[3] The note called attention to the "serious consequences" which might result to American vessels and American citizens if the practice were continued, and it pointed out that there was a distinction between the occasional use of a neutral flag under the stress of immediate pursuit for the purpose of deceiving an approaching enemy, and the general use of the flag with the resulting exposure of neutral ships and persons to constant danger. The Government of the United States, therefore, viewed with "anxious solicitude" any general use of the American flag by British vessels traversing those waters, and the hope was expressed that His Majesty's Government would do all in its power to restrain the use by British merchant vessels of the American flag within the war zone proclaimed by the German Admiralty.

In a memorandum of February 19th addressed to the American Ambassador in London, Sir Edward Grey replied that the captain of the *Lusitania* had of his own accord hoisted the American flag over the ship during its inward voyage, in consequence of the announcement of the German Admiralty that it intended to sink British merchant vessels at sight by means of torpedoes and without making provisions for the safety of their crews and passengers, and that the captain took the same precaution on the outward voyage at the request of the American passengers on the ship. No general order to use neutral flags, he said, had been issued by the Admiralty, and the British Government had no intention of advising their merchant vessels to use foreign flags as a general practice or to resort to them otherwise than for escaping capture or destruction. He took occasion to observe that the laws of Great

[3] The only reported case of the kind was the hoisting of the American flag by the *Lusitania* on two occasions in February, for the purpose of deceiving the commanders of German submarines that lay in wait for the British liner while she was traversing the German war zone on her way to and from Liverpool.

Britain permitted the use of the British flag by foreign merchant vessels for the purpose of escaping capture, and inasmuch as the German Government had announced its intention of sinking British merchant vessels with their noncombatant crews, cargoes, and papers—"a proceeding hitherto regarded by the opinion of the world, not as war, but as piracy," the American Government ought not fairly to ask the British Government to order British merchant vessels to forego the means of escaping not only capture but the worse fate of sinking and destruction. Finally, he added, if the universally recognized obligation of captors to verify the nationality of merchant vessels before destroying them were fulfilled, the hoisting of a neutral flag could not endanger the ship flying it; if, therefore, a neutral vessel were destroyed through disregard of this obligation, the responsibility would be upon the destroying vessel and not upon Great Britain.

Without entering here into a discussion of the law and practice governing the use of false colors as a *ruse de guerre*, it may be observed that there have been many instances in the wars of the past in which this practice was resorted to—sometimes on a very extensive scale.[4] It was frequently resorted to by naval commanders during the Civil War and, as is well known, the German cruiser *Emden* during the present war flew the Japanese flag for many weeks before its career came to an end.

In a note dated February 18th, the German Government replied to the American note of February 10th. The reply consisted largely of denunciation of the "lawless and inhumane" conduct of Great Britain, of veiled criticism of the American Government for its toleration of British violations of the rights of neutrals and of a defense of the German war zone decree as a measure of overpowering military necessity and a justifiable act of reprisal against Great Britain. The note affirmed that hitherto Germany had "scrupulously observed valid international rules regarding naval warfare," and that the German Government had put into force the Declaration of London without alteration and had observed these rules when some of them were diametrically opposed to the military interests of Germany.[5] The British Govern-

[4] More detailed treatment of this question is reserved for a later paper.

[5] The German Government, however, subsequently altered the rules of the Dec-

ment, on the contrary, it was said, had not hesitated to violate the rules of the Declaration, and particularly it had by "a procedure contrary to all humanitarian principles" cut off all supplies from Germany, thereby endeavoring to starve the peaceful civil population of the empire.[6] Although the measures of Great Britain constituted an unlawful infringement upon the rights of neutrals, the American Government had done nothing but make an ineffectual representation. Neutral governments generally had tolerated an unwarranted extension by the British Government of the rules governing the carriage of contraband; and the American Government, in particular, had allowed many millions of dollars worth of arms and munitions of war to be carried to Germany's enemies, and while Germany had not complained that it constituted a formal violation of neutrality, it could not help feeling that Germany's cause had been severely prejudiced by the assistance which had thus been rendered to Germany's enemies.

The note declared:

> Conceding that it is the formal right of neutrals not to protect their legitimate trade with Germany and even to allow themselves knowingly and willingly to be induced by England to restrict such trade, it is on the other hand not less their good right, although unfortunately not exercised, to stop trade in contraband, especially the trade in arms, with Germany's enemies.
>
> In view of this situation the German Government see themselves compelled, after six months of patience and watchful waiting, to meet England's murderous method of conducting maritime war with drastic counter measures. If England invokes the powers of famine as an ally in its struggle against Germany with the intention of leaving a civilized people the alternative of perishing in misery or submitting to the yoke of England's political and commercial will, the German Government are today determined to take up the gauntlet and to appeal to the same grim ally. They rely on the neutrals who have hitherto tacitly or under protest submitted to the consequences, detrimental to themselves, of England's war of famine to display no less tolerance toward Germany, even if the German measures constitute new forms of maritime war, as has hitherto been the case with the English measures.

The German Government, the note added, was resolved

> to suppress with all the means at their disposal the supply of war material

laration of London in consequence of the "refusal of the British Government to observe the Declaration in its entirety."

[6] See on this point the author's article in the April number of this JOURNAL.

to England and her allies and assume at the same time that it is a matter of course that the neutral governments which have hitherto undertaken no action against the trade in arms with Germany's enemies do not intend to oppose the forcible suppression of this trade by Germany.

Having proclaimed a war zone, the limits of which had been exactly defined, Germany was determined to close this zone with mines, and would endeavor to destroy hostile merchant vessels in every other way, although it had no purpose of intentionally destroying neutral lives or property. But the action to be taken against Great Britain necessarily exposed neutral vessels within the war zone to dangers. This was a natural result of mine warfare. Germany felt entitled to hope that all neutrals would acquiesce in these measures, as they had done in the case of grievous damages inflicted upon them by the measures of Great Britain. She had given proof of her good will in allowing a period of not less than fourteen days before putting her war zone decree into force, in order that neutral shipping might have an opportunity to make arrangements to avoid the danger to which it would be exposed by entering the zone. If in view of this warning, neutral vessels should suffer injury within these "closed waters," they and not Germany would be responsible.

The note called attention to a secret order, alleged to have been issued by the British Admiralty, recommending the use by British merchant vessels of neutral flags, and it was asserted that the British Government had supplied arms to British merchant vessels and had instructed them to resist by force attacks by German submarines. Under these circumstances, it would be very difficult for submarines to distinguish between neutral and enemy vessels, for the reason that search in such cases could not be undertaken, owing to the danger of destruction to which both the searching party and the submarine would be exposed in the case of a disguised British ship. Such measures by the British Government would render it impossible to guarantee neutral vessels against injury. Germany must, "in the exigency into which she has unlawfully been forced, make her measures effective at all events in order thereby to compel her adversary to conduct maritime warfare in accordance with international law and thus to reëstablish the freedom

of the seas which she has ever advocated and for which she is fighting likewise today."

As the surest means of avoiding mistakes due to the use by British merchantmen of the American flag, the German Government suggested that the United States provide convoys for their ships carrying "peaceful cargoes" through the British war zone. Finally, the note repeated that Germany had resolved upon the proposed measures only under the strongest necessity of national self-defense, but, it added, that if the United States should succeed in removing the grounds which made those measures a necessity, and particularly if it could find a way to cause the Declaration of London to be respected, the Government of Germany would appreciate such a service in the interest of humane warfare and would "gladly draw the necessary conclusions from the new situations."

With a view to inducing the Governments of Great Britain and Germany to modify in the interest of neutral rights the measures adopted by each against the other, the Government of the United States on February 22d addressed an identical communication to the governments of both countries, in which the hope was expressed that they might, through reciprocal concessions, find a basis for agreement which would relieve neutral vessels engaged in peaceful commerce from the great dangers which they would incur on the high seas adjacent to the coasts of the belligerents. The American Government, as a "sincere friend desirous of embarrassing neither nation involved and of serving, if it may, the common interests of humanity" respectfully suggested: *first*, that Germany and Great Britain agree to abstain from sowing floating mines on the high seas, except within cannon range of harbors for defensive purposes only; and that all mines should bear the stamp of the government planting them and should be so constructed as to become harmless if separated from their moorings. *Second*, that neither belligerent should use submarines to attack merchant vessels of any nationality, except to enforce the right of visit and search. And *third*, that each would require their respective merchant vessels not to use neutral flags for the purpose of disguise or *ruses de guerre*.

To Germany it was suggested that importations of food stuffs from the United States (and from such other neutral countries as might ask

it) should be consigned to agencies designated by the United States Government, which agencies should have entire charge of their distribution and which should be distributed solely to retail dealers having licenses from the German Government, who in turn should be allowed to sell them to non-combatants only, such food stuffs not to be subject to requisition by the German Government for any purpose whatsoever or to be diverted for the use of the armed forces.

To Great Britain it was suggested that food and foodstuffs should not be placed upon the list of absolute contraband, and that shipments of such articles should not be interfered with by the British authorities when consigned to agencies designated by the United States Government in Germany for receiving and distributing the same to licensed retailers.

In a note of March 1st the German Government replied to the suggestions contained in the American communication of February 22d, agreeing to abandon the use of floating mines and to employ only anchored mines constructed in accordance with the American suggestion. On the other hand, it did not appear feasible for belligerents to forego wholly the use of anchored mines for offensive purposes. The note also stated that the German Government was prepared to undertake not to use submarines against the merchantmen of any flag, except when necessary to enforce the right of search, but in case the enemy character of the vessel or the presence of contraband should be established, the submarine would "proceed in accordance with the general rules of international law." The offer to thus restrict the use of submarines was, however, conditioned upon the abstention by enemy merchant vessels of the use of neutral flags, or arming themselves and of resisting attacks, since such procedure, contrary to international law, would render impossible the employment of submarines in accordance with the rules of international law. The American suggestion in regard to importations of foodstuffs was declared to be acceptable, subject to the condition that the importation of raw materials "used by the economic system of non-combatants," including forage, should also be permitted. Finally, it was suggested that the inconveniences to which neutral shipping was necessarily exposed in maritime warfare might be still further reduced by prohibiting the conveyance of munitions of

war from neutral countries to belligerents on ships of any nationality.

In a memorandum handed to Ambassador Page on March 15th, Sir Edward Grey acknowledged the receipt of the American note of February 22d. It was not understood from the reply of the German Government, he said, that Germany was prepared to abandon the practice of sinking British merchant vessels by submarines, and it was evident from the reply that she would not abandon the use of mines for offensive purposes on the high seas. This being so, it was not necessary to make any further reply; nevertheless he would avail of the opportunity to furnish a fuller statement of the whole position and feeling of the British Government in regard to the matter. He then proceeded to review at length various unlawful acts which Germany was alleged to have committed in violation of international law and the laws of humanity since the commencement of the war: the cruel treatment of civilian inhabitants of Belgium; the barbarous treatment to which British officers and soldiers had been exposed after having been taken prisoners; the laying of mine fields in the high seas; the sinking of British merchant vessels instead of taking them into prize courts, and sometimes without warning and without making provision for the safety of the passengers and crews; the destruction of neutral vessels; the bombardment by warships of unfortified, open and defenseless towns, such as Scarborough, Yarmouth and Whitby; the dropping of bombs where there were no military or strategic points to be attacked, etc. As an offset to this array of atrocities committed by Germany, only two charges had been made against Great Britain: the laying of some anchored mines in the high seas, and the seizure of foodstuffs alleged to have been destined to the civil population of Germany, neither of which could be sustained upon legal grounds. Some mines had been laid, said the British note, but they were anchored and so constructed as to become harmless when separated from their moorings. Moreover, no mines of any kind had been laid by the British authorities until many weeks after the German mine policy had made counter-measures a necessity. As to the cutting off of the German food supply from abroad, that was "an admitted consequence of blockade." Furthermore, the seizure of foodstuffs destined for the use of the civil population, although

not in harmony with the practice of Great Britain and the United States, was regarded by some nations as a natural and legitimate method of bringing pressure to bear on an enemy country, as it is upon the defense of a besieged place, and the opinions of Prince Bismarck and Count Caprivi were quoted in support of this view.

In conclusion, the memorandum stated that the Governments of Great Britain and France were resolved to meet the German measures by stopping the shipment of supplies to or from Germany; but, differing from the German policy, they proposed to accomplish their purpose without sacrificing neutral ships or non-combatant lives or inflicting upon neutrals the damage that must result when a vessel and its cargo are sunk without warning, examination or trial. This measure,[7] it was added, "was a natural and necessary consequence of the unprecedented methods, repugnant to all law and morality, which have been described above, which Germany began to adopt at the very outset of the war, and the effects of which have been constantly accumulating."

The efforts of the American Government to bring about a relaxation on the part of Great Britain and Germany of the retaliatory measures which each had adopted against the other having failed, both belligerents proceeded to the extent of their powers to put those measures into operation. Great Britain seized every merchant vessel suspected of carrying supplies directly or indirectly to Germany, and Germany, true to her threat, which some were inclined at first to regard as mere "bluff," proceeded to sink British merchantmen with their crews and passengers, and a number of neutral ships suffered a similar fate. Between February 18th, when the German decree went into effect, and June 25th seventy-eight British merchant vessels and eighty-two fishing craft were reported as having been sunk by submarines, often without warning or with so little notice that it was impossible for the crews and passengers to save themselves. Apparently in no case was any effort made by the

[7] The measure here referred to was an Order in Council of March 11th, virtually establishing a blockade of Germany. It was not described as a blockade in the Order in Council, but in Sir Edward Grey's memorandum summarized above it was so designated. Consideration of this order is reserved for a future article dealing with blockades.

destroyers to provide for the safety of the persons on board, and in many cases the destruction was accompanied by loss of life.[8]

The first case to attract special attention was the destruction on March 28th of the *Falaba*, a British passenger steamer which had on board 160 passengers and a crew of 100 persons. According to the testimony of some of the ship's officers not over ten minutes were allowed the passengers and crew to leave the ship (the officers of the submarine claim that it was actually twenty-three minutes), in consequence of which 111 lives were lost—all of them non-combatants, some of them women and one of them an American citizen. The act aroused a feeling of strong indignation in England and the United States, and it was variously characterized by the American press as "murderous," "atrocious," "cold blooded," "piratical," and the like.[9] The coroner who conducted the inquest declared that "if that was not piracy and murder on the high seas he did not know what it was." The Germans, in defense of this act, asserted that the commander of the *Falaba* disobeyed the summons to surrender and continued to call for help by means of rocket signals, but for which the time allowed the passengers to leave the ship would have been extended.[10] On the same day the British steamer *Aguila* was torpedoed by a German submarine, and several

[8] On May 18th the Secretary of the British Admiralty stated that "the number of persons of all nationalities killed in connection with the sinking by the Germans of 460,628 tons of British merchant and fishing vessels was approximately 1556. On the other hand, no enemy or neutral subject had lost his life in consequence of the destruction by the English of enemy merchant vessels. Moreover British warships had saved from drowning more than 1200 members of the crews of German warships destroyed, whereas no members of British crews had been saved by the Germans."

[9] See the London Weekly *Times* of April 2d and the *Literary Digest* of April 10th.

[10] "Possibly," adds a German writer in the *Fatherland* of April 3d, "the captain's action was inspired by the treacherous tactics of the English Admiralty, which, contrary to international law, attempts to turn all merchantmen into men of war, arms them with guns and advises them to forestall attack by ramming the enemy. One hundred and eleven people have paid toll for this advice. May the *Olympic* profit by this example! Meanwhile our advice to Americans is to eschew British ships."

Dr. Dernburg, in defense of the act, said: "We gave ample warning that every English ship plying to or from a British port after March 18th was going to be torpedoed, with only such warning as the necessities of the case permitted. To venture into the English war zone is like going into a house that is burning. Americans who wish to keep out of harm's way might patronize the American flag."

persons, including a woman, lost their lives. It was claimed that only four minutes were allowed the crew to leave the boat. These cases fairly illustrate the methods of German submarine warfare.[11] But they were relatively unimportant when compared with the torpedoing by a German submarine on May 7th of the *Lusitania*, one of the largest and best known of the British transatlantic liners. It had on board over two thousand persons, practically all of whom were non-combatants, many of whom were neutrals, and a considerable number of whom were women and children. The vessel was torpedoed without a moment's warning, and no effort was made by the submarine to take off the passengers and crew and had it been made it would, of course, have been of no avail. The huge liner sank within twenty minutes after the discharge of the torpedo, and some twelve hundred persons were drowned, more than one hundred of them being American citizens. The act aroused intense indignation throughout England and the United States and was widely denounced as murder. Strong protests were promptly made by the governments of the United States and various other neutral Powers. The American protest dated May 13 declared the act to be "absolutely contrary to the rules, the practices, and the spirit of modern warfare" and a "violation of many sacred principles of justice and humanity."

The note added that the American government confidently expects, therefore, that the Imperial German Government will disavow the acts of which the Government of the United States complains, that they will make reparation so far as reparation is possible for injuries which are without measure, and that they will take immediate steps to prevent the recurrence of anything so obviously subversive of the principles of warfare for which the Imperial German Government have in the past so wisely and so firmly contended.

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Expressions of regret and offers of reparation in case of the destruction of neutral ships sunk by mistake, while they may satisfy international obligations, if no loss of life results, cannot justify or excuse a

[11] Two other cases which excited more than usual indignation, were the torpedoing of the British steamer *Ptarmigan* on April 14th without warning, in consequence of which only eight of the crew were saved, and the destruction of the French steamer *Emma* in the latter part of the same month. On account of the short time allowed for lowering the life boats, only two members of the crew of the *Emma* are reported to have escaped.

practice, the natural and necessary effect of which is to subject neutral nations and neutral persons to new and immeasurable risks.

The Imperial German Government will not expect the Government of the United States to omit any word or any act necessary to the performance of its sacred duty of maintaining the rights of the United States and its citizens and of safeguarding their free exercise and enjoyment.[12]

As has been said, a considerable number of neutral vessels have likewise been sunk by German submarines. One of these was the *Gulflight*, an American steamer laden with a cargo of gasolene, which was torpedoed on May 7th off the Scilly Islands, without warning, but only three lives—all Americans—were lost. The ship was *en route* from Port Arthur, Texas, to Rouen, France. No attempt was made by the submarine to provide for the safety of the crew. On the 28th of April the American steamer *Cushing*, while on its way to Rotterdam, was bombarded by a German aeroplane and was damaged, but no lives were lost, and on May 25th the *Nebraskan*, another American vessel, was torpedoed while proceeding in ballast from Liverpool to the United States. The vessel escaped with serious damage but without loss of life. The commander of the submarine claimed to have mistaken it for an English vessel and the German government expressed its regret and announced its readiness to make compensation to the owners. The attack upon the *Nebraskan* afforded striking proof of the soundness of the American contention that "the employment of submarines is impossible without disregarding those rules of fairness, reason, justice, and humanity which all modern opinion regards as imperative."

As no lives were lost it was possible to make adequate reparation but had the vessel been sunk with the passengers on board the German government would have found it difficult to afford proper satisfaction to the American Government. The procedure in the case of the *Nebraskan* may be compared with that in the case of the *Normandy*, an

[12] Shortly after the sinking of the *Lusitania* it was reported that attempts were made by German submarines to sink the *Transylvania* and the *Megantic*, both British liners, with a large number of passengers on board. On July 9 the Cunard liner *Orduna* with 227 passengers including 22 Americans was attacked without warning by a German submarine. On account of the superior speed of the ship it escaped, though narrowly, destruction. It was quite clear from these attacks that the German Government had no intention of abandoning the practice against which the American Government had protested.

American vessel which was stopped by a German submarine on July 9th and after an examination of its papers was allowed to proceed on its voyage. This is, of course, the procedure required by international law, and if it were followed the risks to which neutral vessels are exposed would be reduced to a minimum.

The German Government in its reply of May 29th to the American note of May 15th in regard to the sinking of the *Lusitania*, disclaimed any intention of destroying neutral ships in the war zone if they were guilty of no hostile acts, and affirmed that where mistakes had been made "on account of the British Government's misuse of flags, together with the suspicious or culpable behavior of the masters of the ships," the German Government had "expressed regrets, and, if justified by conditions, had offered indemnification." It also announced that the cases of the *Cushing* and the *Gulflight* were being investigated and would be treated on the same principles.[13]

Dutch indignation was aroused to a high pitch in April by the destruction by a German submarine of the *Katwyk*, a merchant vessel on a voyage from Baltimore to a port in Holland. The commander of the submarine claimed to have mistaken it for a British vessel, and the German Government expressed its regret for the occurrence and offered to make reparation for the loss of the vessel. Among other Dutch steamers sunk were the *Media*, the *Schieland*, the *Zweina*, the *Ceres* and the *Maria*. Several Danish steamers, among others the *Salvator*, the *Martha*, the *Ely*, the *Katrine*, the *Cocos Merstal*, the *Cyrus*, the *Soborg*, and the *Betty* suffered a like fate. The losses of Norwegian and Swedish vessels have been particularly numerous. Among the Norwegian steamers sunk were the *Glitterlind*, the *Superb*, the *Bellglade*, the *Oscar*, the *Eva*, the *Caprivi*, the *Cubano*, the *Bjorka*, the *Truma*, the *Trud Vang*, the *America*, the *Baldwin*, the *Minerva*, the *Ambus Kenneth*, the *Gieso*, the *Katka*, the *Belridge*, the *Laila*, and the *Nor*. Down to June 12th the number of Norwegian vessels that had been destroyed by mines and submarines was reported as twenty-nine, the aggregate value of which was estimated at $7,500,000, the number of Swedish vessels twenty-four

[13] The destruction of the American sailing vessel *William P. Frye* by a German cruiser, on the ground that it was carrying contraband to England, will be discussed in another paper.

and the number of Danish vessels, fourteen. Among Swedish steamers destroyed were the *Elida*, the *Lappland*, the *Otaga*, the *Vanados*, the *Verdundi*, and the *Elsa*. In some cases the reason alleged for the destruction was that the ships were carrying contraband; in other cases no reasons were reported in the press dispatches.

After this statement of facts regarding German submarine activities, we may consider the conditions under which a belligerent may lawfully destroy enemy merchant vessels. In general, the right of destruction is recognized by international law and practice, although there are certain classes of merchant vessels which are exempt. The Hague convention of 1907 respecting the right of capture in maritime warfare laid down the rule that vessels charged with religious, scientific, or philanthropic missions are exempt from capture (Article 4), and so are vessels employed exclusively in coast fisheries and small boats employed in local trade, provided they take no part in hostilities (Article 3). Not being liable to capture, they cannot, of course, be destroyed. There have been numerous instances of such exemptions, in practice, of the first mentioned class of vessels during the wars of the past.[14] The exemption of coast fishing vessels from capture has long been a recognized rule of international law.[15] The reasons are well stated by Hall, who remarks that "it is indisputable that coasting fishery is the sole means of livelihood of a very large number of families as unoffensive as cultivators of the soil or mechanics, and that the seizure of boats, while inflicting extreme hardships on their owners, is as a measure of general application wholly ineffectual against the hostile state." [16] It is not easy to see why the same considerations would not exempt small vessels engaged in deep sea fishing, many of which have been sunk by German submarines during the present war.[17] Finally, the Geneva

[14] Higgins, The Hague Peace Conference, p. 105; see also Westlake, International Law, Vol. II, pp. 133–138, Oppenheim II, p. 193, and Dupuis, pp. 206–212, where the subject is fully discussed.

[15] See the opinion of Justice Gray in the case of the *Paquette Habana* (1899), 175 U. S. 677, and Scott's cases, p. 19; also the opinion of Lord Stowell in the *Young Jacob Johanna*, 1 Rob. 20.

[16] International Law, p. 451.

[17] In the early part of the present war a British prize court upheld the legality of the capture of the *Berlin*, a German vessel engaged in deep sea fishing. It was not, said the court, entitled to the immunity allowed ships engaged in coast fishing.

conventions of 1899 and 1907 (Article 2) declare that hospital ships, equipped wholly or in part at the expense of private individuals or officially recognized relief societies, shall be exempt from capture. While the German decree of February 4th declared that *all* enemy merchant vessels encountered in the war zone would be destroyed, it is not probable that it was intended to include the above mentioned classes, and it does not appear that any such vessels have, in fact, been captured or destroyed by either belligerent.[18]

With these exceptions, the right of destruction under certain conditions is generally admitted, although it is a universally recognized principle of international law that all prizes ought if possible be taken into a prize court in order to have the lawfulness of the capture judicially determined.[19] That a captor has a right, says Bentwich, to sink an enemy vessel cannot be doubted, though it is always preferable to bring

[18] During the present war the German Government lodged a protest with the American Ambassador at Berlin against the seizure by a British cruiser of the German ship *Paklat*, engaged in conveying women and children from Tsing-Tau, the German port of concession in Shantung, to Tien Tsin. The German Government contended that the *Paklat* was engaged in a "humanitarian" mission and its capture was therefore a violation of the above mentioned provision of The Hague Convention. The British Government replied that the conveyance by the *Paklat* of women and children from a fortress about to be beseiged was not a "philanthropic" mission within the meaning of Article 4 of The Hague convention and that the question must be submitted to a prize court for determination. Sir Edward Grey also called attention to the case of the French refugee ship *Amiral Gauteume*, which was torpedoed by a German submarine in the English Channel "in violation of the laws of humanity." The German Government could not, therefore, claim the right to torpedo a French merchant ship engaged in the transportation of refugees and at the same time protest against the capture and trial by a prize court of a German ship while on a similar errand. In May of the present year a British prize court condemned the *Ophelia*, a German vessel which was alleged to have been fitted out as a hospital ship. When first sighted it was not flying the Red Cross flag, but when a British submarine began pursuit the Red Cross flag was hoisted and the ship put on full steam and attempted to escape. An inspection of the ship revealed the fact that it had no accommodations for nurses and was unsuited for a hospital. Before it was boarded by the searching officers the German commander threw overboard the papers. The court held that it was an auxiliary naval vessel masquerading under false colors.

[19] Compare the letter of instructions of Sir Edward Grey to Lord Desart, president of the British delegation to the International Naval Conference of 1908–09, Proceedings of the Conference, House of Commons Sessional Papers, Vol. 54, Misc. No. 4 (1909), p. 28.

it in for adjudication.[20] Almost all publicists, says Bonfils, admit the right of a captor to destroy a prize in case of *force majeure* or absolute necessity, and he cites in support of this view Valin, Pistoye et Duverdy, Calvo, Bluntschli, Bulmerincq, Gessner, Perels, Bernard, Travers-Twiss, Wildman, Hall, and Kent. To this list may be added Wheaton, Phillimore, Risley, Oppenheim, Lawrence, Pradier-Fodéré and many others. There are, however, some authorities who do not approve the right of destruction. The whole practice, says Woolsey, is "a barbarous one and ought to disappear from the history of nations." [21] Bluntschli [22] and Heffter [23] allow it only in case of absolute necessity, and Bluntschli adds that every infringement upon this principle is a violation of the law of nations. Perels holds that a captor may never destroy until his right of ownership has been determined in a prize court,[24] and Kleen takes the same view.[25] All the reasons, says Dupuis, in favor of the destruction of prizes are bad, and the practice should be prohibited.[26] The right has often been sustained by the British and American Admiralty courts. Lord Stowell affirmed that captors cannot properly permit "enemy property to sail away unmolested. If impossible to bring it in, their next duty is to destroy it." [27] Dr. Lushington likewise held that it may be justifiable or even praiseworthy of the captors to destroy an enemy vessel.[28] The prize regulations of most states expressly authorize destruction under certain conditions [29] and in practice it has frequently been resorted to in the wars of the past. During the American Revolution many British and some American merchantmen were destroyed by enemy cruisers. During the war of 1812 the

[20] Law of Private Property in War on Land and Sea, p. 93; see also Lawrence, Principles of International Law (4th. ed.), p. 483.

[21] International Law, Sec. 148.

[22] *Le Droit International Codifié* (Lardy), Sec. 672.

[23] *Droit International*, Sec. 138.

[24] *Internationale öffentliche Seerecht der Gegenwart*, p. 299.

[25] *Les Lois de la Neutralité*, Vol. II, p. 531.

[26] *Le Droit de la Guerre Maritime*, p. 369.

[27] The *Felicity* (1814), 2 Dodson's Admiralty Reports, 381.

[28] The *Leucade* (1855), Spinks Admiralty Reports, 221; see also the American case of Jecker *v.* Montgomery (1851), 13 How. 498.

[29] See the texts in International Law Situations for 1905, pp. 64–67; for 1907, pp. 77–79.

captain of the *Constitution* was instructed that "the commerce of the enemy is the most vulnerable point we can attack, and its destruction the main object; and to this end all your efforts should be directed. Therefore unless your prizes shall be very valuable and near a friendly port, it will be imprudent and worse than useless to attempt to send them in." Somewhat similar instructions were given other commanders.[30] In pursuance of these instructions, seventy-four British merchantmen are said to have been destroyed.[31] As is well known, many merchant vessels were sunk or burned by the commanders of Confederate cruisers during the Civil War, there being no ports open into which they could take their prizes. Semmes was instructed by the Confederate Secretary of the Navy to do the enemy's commerce the greatest injury in the shortest time.[32] During the Franco-German War of 1870–71 two German merchant vessels (the *Ludwig* and the *Vorwärts*) were burned by the French on account of inability to spare prize crews and a French steamer (the *Max*) was burned by the Germans.[33] During the Russo-Turkish War of 1877 and the Russo-Japanese War of 1904–5,[34] enemy merchant vessels were destroyed by Russian cruisers; and during the Spanish-American War three Spanish merchant vessels were destroyed by an American cruiser.[35]

[30] Moore's Digest of International Law, Vol. III, pp. 516–517.

[31] Hall, *op. cit.*, p. 547.

[32] The extraordinary success with which these instructions were carried out is interestingly told in his Service Afloat During the War Between the States (Baltimore, 1887). See pp. 385–386 for his justification of the right to destroy enemy vessels. His own acts, he asserts, were far less open to objection than the destruction of British merchant vessels by John Paul Jones, since every American port was open to Jones, whereas there was not a single port into which he could take a prize. He sent some prizes to Cuba and Venezuela but they were "handed over to the enemy." "Unlike Jones," he says, "I had no alternative. There was nothing left for me to do but destroy my prizes, and this course had been forced upon me by the nations of the earth."

[33] Bonfils, *Droit International Public*, sec. 1415. Apparently von Liszt considers the destruction of the German merchant ships in 1870 by the French as a violation of international law. See his *Das Völkerrecht*, p. 351.

[34] Takahashi, International Law Applied to the Russo-Japanese War, pp. 275–330. According to Takahashi, 21 of the 24 Japanese ships captured by the Russians were destroyed.

[35] Benton, International Law and Diplomacy of the Spanish-American War, p. 178. This act was criticised by Lefur in the *Revue de Droit Int. Pub.*, Vol. V,

From this summary it is clear that the right to destroy under certain conditions enemy merchant ships without taking them into a prize court has been so often exercised in practice that its legality can scarcely be contested at this time. And owing, as Hall [36] points out, to the wide range of modern commerce, the inability of modern cruisers to spare prize crews and the growing indisposition of neutrals to admit prizes within their ports,[37] convenience and self-interest are continually inducing belligerents to exercise more frequently their rights of destruction instead of taking vessels in. If the right of destruction were denied, German measures against the commerce of England at present would be practically impossible, for the reason that submarines, which are almost the only German naval craft left in actual service, are not fitted for taking prizes in. With neutral ports closed to her prizes, her own ports virtually blockaded, and employing craft which are unsuited to the conveyance of prizes to distant ports, nothing remains but to destroy or release them.[38] It seems likely that the introduction on a wide scale of mine and submarine warfare will have the effect of making destruction the rule and prize adjudication the exception in the wars of the future, unless the right of destruction is forbidden by general agreement. Exercised subject to the conditions to be described below and confined

p. 809, as unjustifiable. The United States authorities, however, claimed that the ships were transports.

[36] International Law, p. 457. Compare also Lawrence, Principles of International Law, p. 406.

[37] Most neutral states now forbid belligerents to bring their prizes into their ports (For examples of such regulations, see International Law Situations, 1907, pp. 76–77). The Hague convention in respect to neutral rights and duties in maritime war forbids the setting up of prize courts by belligerents in neutral territory (Art. 4) and the bringing of prizes into neutral ports, subject to a few exceptions (Art. 21). The effect is to make resort to "quarter deck" courts and the destruction of prizes a practical necessity in the case of a belligerent whose own ports are closed by a blockade or otherwise. The wisdom of the provision may well be doubted.

[38] Valois, Germany as a Naval Power, p. 57, calls attention to the fact that in a possible war between Germany and England, the German cruisers would have scarcely any chance of bringing their prizes in, and they would therefore be forced to destroy them. "The German zones of protection lie too far away from a probable theatre of maritime warfare. The prizes we took would thus be generally recaptured from us by the English on the way to a German port. On the other hand, England, by a deliberate policy has for hundreds of years acquired colonies everywhere and can easily carry the prizes into one of its numerous ports."

to enemy vessels, it is difficult to see wherein lies the harsh criticism of the practice made by Woolsey and a few others, so long as the right of capture in maritime warfare is recognized as lawful. If the enemy character of the ship is undoubted, capture extinguishes the right of the former owner, and it belongs to the captor to do what he will with his property, and ordinarily it is immaterial to the former owner whether his ship is sunk or condemned by a prize court and sold.[39] Destruction of neutral property or non-combatant persons on an enemy vessel is, however, a wholly different matter and will be considered later.

Having stated the law and practice in regard to the right of a belligerent to destroy enemy merchant vessels subject to the exceptions mentioned, we may now consider the limitations upon the exercise of the right. An extended examination of the opinions of international law writers, the decisions of the admiralty courts, and the naval prize regulations of the more important states fail to reveal any opinion whatever in favor of the right to destroy merchant vessels under any and all circumstances and subject to no restrictions. The universal opinion is that destruction is permissible only in certain exceptional cases and always subject to the observance of certain rules by the captor.

The instructions issued by the United States Government to the blockading vessels on June 20, 1898, stated that "if there are any controlling reasons why vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious diseases, or the lack of a prize crew, they may be appraised and sold; and if this cannot be done they may be destroyed. The imminent danger of recapture would justify destruction if there was no doubt that the vessel was a good prize. But in all such cases all the papers and other testimony should be sent

[39] Compare on this point, Hall, *op. cit.*, 459; Bentwich, Law of Private Property in War on Land and Sea, p. 94; Lawrence, *op. cit.*, p. 483, and Risley, Law of War, p. 149. Semmes, in defending the right to destroy without adjudication, remarks that "the enemy has no right to adjudication at all. Courts of admiralty are not established for him. He has and can have no standing in such courts. He cannot even enter an appearance there, either in person, or by attorney; and if he could, he would have nothing to show, for his very status as an enemy would be sufficient ground for condemning all the property he might claim. It is only neutrals who can claim adjudication, and it is for their benefit alone that courts of admiralty have been established," Service Afloat, p. 387.

to the prize court in order that a decree may be duly entered." [40] Nothing is said in regard to the obligation of the captor to provide for the safety of all persons on board before destroying the vessel, but it may be assumed that it was not the intention of the American Government to authorize destruction of ships in the absence of such provision. The British Manual of Naval Prize Law of 1888 authorizes destruction of enemy vessels which are unseaworthy or if the commander is unable to spare a prize crew, where there is *clear proof* that the vessel belongs to the enemy, but in such cases the commander is required to remove the crew and papers and, if possible, the cargo. The regulations issued by the Japanese Government at the outbreak of the war with China in 1895 authorized the destruction of enemy vessels that were unfit to be sent to a port, but only after the commander had taken off the crew and papers and, if possible, the cargo.[41] The Japanese regulations of 1904 went further and authorized the destruction of enemy vessels that were unseaworthy, when there was danger of recapture, and when a prize crew could not be spared without endangering the safety of the captor's vessel. But, it was added, "before destroying or disposing of the vessel, the commander shall transship all persons on board, and, as far as possible, the cargo also, and shall preserve the ship's papers." The Russian regulations of 1901 authorize a more general destruction, but only after the removal of the crew and the papers and, as far as possible, the cargo.[42]

The provisions of these regulations are fairly typical and indicate the general practice. In most of them the obligation of the captor to provide for the safety of the passengers and crew before destroying the vessel is expressly affirmed; where it is not, it may be assumed that the omission was due either to inadvertence or to the feeling that it was unnecessary to require in express terms the performance of a duty demanded

[40] This is the identical language of Article 50 of the United States Naval Code of 1900.

[41] Takahashi, International Law During the Chino-Japanese War, p. 183.

[42] For a summary of the prize regulations of various states so far as they relate to destruction of enemy vessels, see International Law Situations, 1905, pp. 64–67, 1907, pp. 76–80. See also Moore's Digest, Vol. VII, pp. 518–519. For other cases than those mentioned above in which the right of destruction is claimed, see Webberg, Capture in War on Land and Sea, pp. 94–95.

by every consideration of common humanity. This duty seems to be regarded by most writers who have considered the subject as one so imperative as not to need express affirmation. Professor Holland summarizes the opinions of Lord Stowell on this point as follows: "An enemy ship *after her crew has been placed in safety* may be destroyed." [43] Mr. A. Pearce Higgins remarks that "In all cases where enemy ships are destroyed, all persons on board and all documents essential in elucidating the matter in the prize court are previously to be taken from the ship." [44] "If an enemy's ship and cargo are destroyed under some necessity," says Atherley-Jones, "care must be exercised in taking out all the persons on board together with their baggage." [45] The contrary view is not expressed by any writer so far as I am aware. The Hague convention of 1907 respecting the status of enemy merchant ships at the outbreak of hostilities (Art. 3), in authorizing the destruction of enemy ships (subject to indemnity) which had left their port of departure before the commencement of the war, conditioned the exercise of the right upon provision being made for the safety of the persons on board as well as the preservation of the papers.[46] Likewise the Declaration of London (Art. 50), in sanctioning the destruction of neutral vessels in certain contingencies, declares that "before the vessel is destroyed all persons on board must be placed in safety." Speaking of the obligation imposed on captors by this article, Bentwich [47] remarks that in the future the captor will have to provide for the reception of the crew, and possibly also the passengers, of the prize which he destroys, either on his own ship, where there is little room to spare, or in some vessel of his own or of a neutral state which he can induce to receive them. It is probable, therefore, he adds, that cruisers in the future will refrain from sinking their larger and more important prizes such as ocean liners,

[43] Letter to the London *Times*, August 1, 1904.

[44] War and the Private Citizen, p. 78. See also his, The Declaration of London, p. 98. "The generally observed rule in regard to the destruction of an enemy's vessel is 'an enemy ship can be destroyed only after her crew has been placed in safety.'" (International Law Situations, 1905, p. 73). "Passengers and equipage," says Dupuis, (*Droit de la Guerre Maritime*, p. 369), "must before destruction of the ship be put aboard the captor vessel."

[45] Commerce in War, p. 529.

[46] See the remarks of Higgins, The Hague Peace Conferences, p. 305.

[47] Declaration of London, p. 98.

both because they cannot accommodate their crews and passengers and because they would thus sacrifice a valuable asset to their country and might involve it in large claims for damages. In the memorandum submitted by the German delegation to the International Naval Conference the view was expressed that ships and cargoes captured should be taken to the seat of a prize court in order that the capture could be adjudicated, but that in exceptional cases ships or goods might be sunk or otherwise destroyed if the taking of them in compromised the safety of the captor's vessel or the success of his operations. It added, however, that before destroying the ship the safety of its *équipage* and papers must be provided for, as well as all other *pièces* which were deemed essential to the determination of the validity of the capture.[48] The German delegation gave its approval to Article 50 of the Declaration of London, which definitely imposes this obligation upon captors in the cases in which it authorized the destruction of enemy vessels, and the German Government put the Declaration into force at the beginning of the present war, with this provision unaltered.

There was a difference of opinion at the Conference regarding the circumstances under which merchant vessels might be destroyed, but no voice was raised against the rule in respect to the obligation of the captor to provide for the safety of all persons on board. Had a proposal been made to dispense with this obligation in cases where the captor did not have adequate facilities and to allow him to destroy the crew and passengers with the ship, it is not probable that the proposal would have received a single vote in its favor.

It is clear from this review of the authorities, the prize court decisions, and the provisions of international conventions respecting the destruction of enemy ships, that the obligation of the captor to provide for the safety of the passengers and crews is a thoroughly established rule of international law. In practice, this obligation has been generally respected by naval commanders in the wars of the past. During the American Revolution, John Paul Jones apparently always removed persons on board before burning his prizes, and when he was unable to

[48] Proceedings of the International Naval Conference, House of Commons Sessional Papers, Vol. 54, Misc. No. 5, (1909) p. 99.

do so the ship was released.[49] This also seems to have been done by naval commanders during the war of 1812.[50] Even Semmes, who was variously described as a "freebooter," "corsair," and "pirate," never destroyed an enemy vessel without taking off the crew. In one case he released a valuable prize (the *Ariel*) because he had no accommodations on his own ship for the five hundred women and children who were aboard the captured vessel.[51] Describing his treatment of his numerous captives, he says, "We were making war upon the enemy's commerce, not upon his unarmed seamen. It gave me as much pleasure to treat these with humanity as it did to destroy his ships." [52]

During the Russo-Japanese War some indignation was aroused in Japan over the report that the Russian Vladivostock squadron had sunk a number of Japanese vessels, (notably the *Nakonoura Maru*, the *Goyo Maru*, the *Haginoura Maru*, and the *Kinshiu Maru*) with all persons on board, but the first reports proved untrue, and it turned out that the crews had been taken off and saved by the captors.[53] During the present war this

[49] Cf. Allen, Naval History of the American Revolution, Vol. I, pp. 121, 124.

[50] Thus we read in the decision of the admiralty court in the case of the *Felicity* (2 Dodson, 383) that "the captain and the crew with their baggage were removed on board the cruiser and the *Felicity* was destroyed."

[51] "I was very anxious to destroy this ship," he says, "as she belonged to a Mr. Vanderbilt, of New York, an old steam boat captain who had amassed a large fortune in trade and was a bitter enemy of the South. Lucrative contracts during the war had greatly enhanced his gains, and he had ambitiously made a present of one of his steamers to the Federal Government to pursue 'rebel pirates.' Failing to overhaul another ship of the enemy in the few days that I had at my disposal, I released the *Ariel* * * * and sent her and her large number of passengers on their way rejoicing." Service Afloat, p. 535. When he destroyed the *Hatteras*, a warship, "every living being in it," he says, "was safely conveyed to the *Alabama*."

[52] Service Afloat, p. 131. Mr. John A. Bolles, Solicitor of the United States Navy during the Civil War, bears testimony to the truth of this statement. In an article in the *Atlantic Monthly*, Vol. 30, p. 150 (1872), entitled, "Why Semmes of the *Alabama* was not Tried," Mr. Bolles states that he examined all the charges of cruelty brought against him and that "in not a solitary instance was there furnished a particle of proof that the 'pirate Semmes,' as many of my correspondents called him, had ever maltreated his captives or subjected them to needless or unavoidable hardships or deprivations." Mr. Bolles relates that in one case it was charged that Semmes had burned a ship with all persons on board, but upon investigation he was satisfied that the charge was without foundation. Cf. also Marvin, History of the American Merchant Marine, p. 327.

[53] Lawrence, War and Neutrality in the Far East, p. 40. The details regarding

procedure seems to have been followed by the German cruisers whenever they made captures, for we are told that the captains of the *Emden*, the *Karlsruhe*, and the *Eitel Freidrich* were careful to save the crews and passengers, and that whenever they could not, for lack of facilities, they allowed the ship to go. The captain of the *Emden*, in particular, took off hundreds of men, women, and children from the ships that he sank. In one case he is reported to have released a British merchantman with a cargo valued at a million dollars because his ship was so crowded that he could not provide accommodations for the crew. British naval commanders pursued the same policy. The Secretary of the British Admiralty stated on May 18th that while the English had destroyed or captured 314,465 tons of German shipping, so far as known no enemy or neutral subject had been killed in connection therewith.

In former wars the sinking of enemy vessels was usually unaccompanied by the drowning of the crews and passengers. The destruction was wrought by a battle ship or cruiser openly and above board. The customary procedure was to fire an unshotted gun (the *coup d'assurance*) as a signal to the vessel to heave to. An officer then went aboard to verify the ship's papers, and to determine its nationality. If its enemy character was established, and there were controlling reasons why it should not be sent in, the officer took possession of its papers, all persons on board were removed and put aboard the capturing vessel, after which the prize was sunk or burned.[54]

But the procedure of destruction practiced by the commanders of the German submarines during the present war differs widely from the older and more humane practice described above. These craft approach enemy vessels under water; in many instances, as was the case in the destruction of the *Lusitania*, they give no warning at all before discharging the torpedo; in other cases the time allowed the crew and passengers to man the lifeboats and leave the ship was insufficient. In no case was any effort made by the commander of the submarines to take off the persons on board. Obviously such efforts would be fruitless,

these and other cases of the destruction of Japanese vessels are fully narrated in Takahashi's International Law Applied to the Russo- Japanese War, pp. 284–310.

[54] For descriptions of the usual formalities observed in capturing or destroying prizes see Atherley-Jones, Commerce in War, Chapter VIII, and Webberg, Capture in War on Land and Sea, Chapter VII.

for submarine craft have no facilities for taking care of the crews and passengers of ships which they destroy. Consequently if they sink the ship they must either destroy those on board or allow them sufficient time to save themselves by means of the lifeboats. The latter alternative is not always possible without exposing the submarine to destruction by an enemy warship, which may be summoned by wireless or by signals, or by being rammed and sunk by the ship which it seeks to destroy. Moreover, owing to the relatively slow speed of submarines, notice of an intention to attack would in many cases afford the ship an opportunity to escape. The only sure means of destroying the vessel, therefore, is to torpedo it without warning or after a very brief notice, and this has been the general practice followed by German submarine commanders.

Is such a procedure in conformity with the recognized rules of international law? It is difficult to see how the question can be answered in the affirmative. The civilized world, as Spaight aptly remarks, has given its approval to two great principles: first, that the sole object of war is to overcome the military forces of the enemy; and, second, that the means which may be adopted to accomplish this object are not unlimited.[55] The plea of overpowering military necessity, which is the basis of the German distinction between *Kriesgrecht* and *Kriegsraison*, cannot be admitted in this age as a justification for the deliberate killing of non-combatant enemy subjects and neutrals on a merchant ship pursuing a lawful voyage on the high seas. "A captor," says Lawrence, "has no right to destroy an enemy merchantman unless its summons to surrender is disregarded, or its search resisted, or an attempt made to recapture the vessel after surrender. It may then use force to attain its proper end of capture, and if incidentally the ship is sunk, her crew have only themselves to thank. But to send helpless mariners to their death without giving them an opportunity to surrender would be an act of cruel and lawless violence." [56]

[55] War Law in Land Warfare, p. 74.

[56] War and Neutrality in the Far East, p. 40. A cruiser, says Kleen, (*Les Lois et les usages de la neutralité*, Vol. II, p. 531), which does not have at its disposition the means or facilities for complying with all the conditions of a legal seizure is not a competent captor. The destruction of the *Armenian* on June 28th was justified

"The law and custom of nations in regard to attacks on commerce," said Sir Edward Grey in his note of March 1, 1915, to the American Government, "have always presumed that the first duty of the captor of a merchant vessel is to bring it before a prize court where it may be tried, where the regularity of the capture may be challenged, and where neutrals may recover their cargoes."

The sinking of prizes is in itself a questionable act to be resorted to only in extraordinary circumstances and after provision has been made for the safety of all the crew and passengers, if there are passengers on board. The responsibility for discriminating between neutral and enemy vessels, and between neutral and enemy cargo, obviously rests with the attacking ship, whose duty it is to verify the status and character of the vessel and cargo and to preserve all papers before sinking or even capturing it. So also is the humane duty of providing for the safety of the crews of merchant vessels, whether neutral or enemy, an obligation upon every belligerent.

* * * A German submarine, however, fulfills none of these obligations; she enjoys no local command of the waters in which she operates; she does not take her captures within the jurisdiction of a prize court; she carries no prize crew which she can put on board a prize; she uses no effective means of discriminating between a neutral and an enemy vessel; she does not receive on board for safety the crew and passengers of the vessel she sinks; her methods of warfare are therefore entirely outside the scope of any of the international instruments regulating operations against commerce in time of war.

There is a clear distinction between the right of a belligerent to destroy an enemy merchant vessel and the right to destroy the lives of the unoffending non-combatant enemy subjects and neutrals which it may have on board. The former, subject to certain conditions, is lawful; the latter is never justifiable. The Germans have ignored this distinction and have attempted to justify the destruction of passengers and crews on the ground that submarines have no facilities for taking them off. On this point Dr. Dernburg, in a statement furnished the press shortly after the sinking of the *Lusitania*, said:

It has been the custom heretofore to take off passengers and crew and tow the ship into port. But a submarine, say 150 feet long, cannot do it. It has no accommodations for either passengers or crew. The

because the commander refused to obey the summons to surrender and attempted to escape.

submarine is a frail craft and may easily be rammed, and a speedy ship is capable of running away from it.

"Any orders to submarine commanders," said Count Reventlow in an article in the *Tages Zeitung*, "requiring them to conform to any of the formal conditions laid down by international law, would mean the hindering of their actions and make the submarine an empty farce, a kind of screen behind which one would obediently have to withdraw." In short, the introduction of the submarine, it is contended, has rendered obsolete the old rules of international law governing the right of capture, or to state it differently, the nation which employs such engines of warfare is free to repudiate those rules because their observance would render the employment of such craft impracticable. The argument that submarines may destroy at sight because they cannot always give warning without exposing themselves to the danger of destruction amounts to a claim of special immunity for this class of war craft, that is to say, they must be relieved from the obligations of international law because they are different from other war vessels. It seems almost inconceivable that such a contention would now be put forward seriously, but German authorities of high repute are doing it. This view cannot be admitted. The true principle was laid down by the United States Supreme Court in the case of the *Scotia*,[57] where it was said that the law of the sea is of universal obligation and no single nation can change it.

The obligation of belligerents to spare the lives of unoffending noncombatants (to say nothing of the lives of neutrals) is one of the oldest rules of war, and hitherto it has been one of universal recognition. The obligation is as binding upon naval as upon military commanders, and it is as binding in portions of the sea that have been publicly proclaimed as war zones as anywhere else. The use of new implements of warfare, the employment of which renders impossible conformity to universally recognized rules of international law that are founded upon considerations of justice and humanity, cannot be admitted as lawful unless the world is prepared to abandon some of its most sacred and fundamental notions of justice. Manifestly there are certain rules of international law that will be rendered wholly or partially obsolete in consequence of

[57] 14 Wallace, 170 (1871).

the introduction of the submarine and other new agencies of warfare, but it may be safely assumed that "those rules of fairness, reason, justice and humanity which all modern opinion regards as imperative" will not be abandoned in consequence of the invention of new and more powerful implements of destruction.[58]

Not a few writers maintain that the employment of torpedoes for the purpose of destroying merchant vessels ought not to be recognized as lawful. One of these is M. Desjardins, who holds that their use should be confined exclusively against warships.[59] Rivier[60] holds the same view, and so do Martens[61] and others.[62] Undoubtedly there is much to be said in favor of this view. One of the objections raised at

[58] Herr Carthous, a high official of the Imperial Government, in an address, a translation of which is published in the New York *Times* of July 13th, argues that the German methods of submarine warfare are not contrary to international law. International law, he says, is not so circumscribed that it does not admit of further "development" in consequence of new inventions and new conditions. The employment of submarines is permissible, we are told, when their use is "commanded by necessity." "Germany's choice lies between sinking captured merchantmen and giving up the use of submarines and employing them only against the enemy's warships." It is not fair, he says, to expect Germany to relinquish the use of so very effective a weapon for "general humanitarian reasons" when she is engaged in waging a war forced upon her by reckless and cruel enemies. The speciousness of this line of argument is too evident to require an extended answer. When he speaks of the "development" of international law as a consequence of new inventions he of course has in mind, not its development in any true sense of the word, but its repudiation through the abandonment of long established and humane rules of war, in order to permit methods which cannot otherwise be legally employed. His plea of military necessity is nothing less than an argument in favor of the right of a belligerent to employ any and all means without restriction for destroying the enemy, regardless of the rights of non-combatants and even of neutrals.

Throughout his whole argument there runs the usual German confusion of the right to destroy enemy merchant ships, which no one denies, with the right to destroy the lives of non-combatants and neutrals, a right which does not exist.

[59] *Les Torpilles et le Droit des Gens*, in the *Revue de Droit Maritime* (1886), Vol. II, p. 75.

[60] *Principes du Droit des Gens*, Vol. II, p. 337.

[61] *Traite de Droit International*, Vol. III, Sec. 110.

[62] "I can hardly believe," says M. Du Pin de Saint-André, "that European nations are barbarous enough and so destitute of reason as to send against ships of commerce torpedoes which can only sink them, instead of intercepting them by cruisers which are able to take them in, to the great advantage of the captors and their nation." *La question des Torpilleurs*, in the *Revue des Deux Mondes*, Vol. LXXV (1886), p. 880. Compare also *J. Imbart de Latour, La mer Territoriale*, pp. 322–323.

the Second Hague Conference against the right to destroy merchant vessels was the lack of adequate facilities on modern warships for taking care of the persons on board the ships destroyed. This objection was pointed out with particular emphasis by one of the American delegates, General Davis, who also called attention to the fact that neutral persons and non-combatants if put aboard warships would be exposed to the dangers of battle in a much greater degree than when fleets were constructed of wood and driven by wind.[63] In all the discussions on the subject, it was assumed that the right of destruction was conditioned upon the obligation of the captor to provide for the safety of the crews and passengers, and never once was it intimated that inability to make such provision constituted a sufficient defense against disregard of the obligation.

JAMES W. GARNER.

[63] *Actes et Documents de la Deuxième Conference de la Paix*, tome III, p. 1050.

THE DOCTRINE OF SERVITUDES IN INTERNATIONAL LAW

The doctrine of servitudes as it stands at present in international law is in a very incoherent state. From the Roman law [1] the concept, with an elaborate set of rules for its operation [2] but with no philosophic or theoretical development, was transmitted at the time of "the Reception" to the semi-feudal *jus publicum* of the sixteenth and seventeenth centuries.[3] During the seventeenth and eighteenth centuries the doctrine was taken over by the developing *jus gentium*.

This experience, this double growing over from private law to public law and thence to international law, has sadly shattered the doctrine. The modifications made by feudal and dynastic and mercantilist manipulation have warped the concept out of all symmetry. Indeed, it is possible that traits picked up en route have ruined the doctrine for modern use.

For the servitude is essentially a portion of proprietary law and as such it is becoming an historic, rather than a legal category,[4] as public law as well as private, is tending to dispense with its proprietary modes; and the servitude as such is losing ground.[5] At most we can study the practice of nations in the matter;[6] to construct any pretentious legal doctrine is impossible.

[1] For historic bibliography see Nys in *Revue de Droit Int. Pub.*, 1911, Vol. XIII, p. 118, and North Atlantic Fisheries Arbitration (Vols. I–XII, published by Congress), Vol. IX, p. 574, *et seq.;* for period of *jus publicum* see Heffter, *Droit Internat.*, index, "Servitudes."

[2] Digest, VIII, 1.

[3] Moser, *Nachbarliches Staatrecht*, Bd. III, chs. 4–17, describes the situation. It has even been loosely stated that servitudes arose in feudal dues. That is, as we know, inaccurate; that the servitude was a legal form of particular use to the feudal age is true, but no more can be said. Holtzendorff, *Handbuch*, p. 293.

[4] The latest utterance, qualified, but still significant, is in North Atlantic Fisheries Arbitration, Vol. I, p. 76. Nys believes the whole thing to be a matter of history, not of legal science, *q. v. loc. cit.*, 314; *Les Prétendues Servitudes;* cf. also Fricker, *Gebiet u. Gebeitshoheit*, p. 68.

[5] Cf. what is said in IX, North Atlantic Fisheries, 560.

[6] VIII, North Atlantic Fisheries, 26.

As the doctrine stands today, there are certain elements which emerge from the nature of servitudes which may be examined one by one and the aggregate of which will afford a fairly complete understanding of the subject. With four of these questions we shall now busy ourselves, and after reviewing these elements in the servitude analytically, we shall attempt to throw further light on the subject by classifying the various sorts of actual servitudes. Finally, some questions involved in the process of the termination of servitudes will occupy us. Let us turn to the analysis.

Probably the most outstanding feature of the law of servitudes in international relations is the territorial element. The statement that "servitudes are charges to which the territory of a state is subject" [7] is classic. Until a few years ago this principle was not questioned, the analogy from the Romano-Public law still held and servitudes were *in rem*.[8] There is some doubt now about this, but it would be inaccurate to state any other position yet, although a recent writer rashly says: "*Servitude ne sont presque jamais des servitudes réeles.*" [9] Indeed, if the term has any place in jural language at all it is here in regard to "territorial obligations." Ordinarily a territorial obligation is by its nature permanent and therefore a servitude; other obligations are "merely moral." It seems to the writer that the following is the explanation of the question: The primary disadvantages between states are those resting in territorial variations of fertility and economic serviceability. Thus servitudes had for their primary object better distribution of the earth's resources. And as some law of property certainly existed antecedent to the law of servitudes, the latter were cast in the given forms of proprietary law because of their connection with the subject-matter of that law, which, at that early stage, referred rather to realty than to personalty. Cast in this mold servitudes retain their real nature whereas their form should be revised, along with other proprietary law, into more flexible forms to include personal obligations.

Moreover, the servitude is essentially negative; [10] that is, it is a re-

[7] Hall, Int. Law, p. 43.

[8] Bonfils, *Manuel*, pp. 181, 183, 344; Pradier-Fodéré, *Traité*, I, pp. 396–7; Engellbrecht, *De Serv. Jur. Pub.*, p. 232, *seq.*; Klüber, *Droit des Gens*, p. 197; Hall, p. 158.

[9] Fabres, *Des Servs.*, p. 27.

[10] Accordingly, tribute payment is ruled out. Fabres, 26.

striction [11] on the territorial sovereignty of the servient state. From the point of view of the dominant [12] state it is, perhaps, positive. But the view of the servient state is the significant one. This party has its jurisdiction restrained, is to refrain from doing acts it might otherwise do and allow (or it is restrained from preventing) [13] acts on the part of another state it might otherwise forbid. The servient is not to be considered as actively doing any service to the dominant. It allows, it does not perform.

The term "servitude" has led to many misunderstandings. It implies active service, abject obedience and unlimited control. As a matter of fact, there is no active service, but merely passive permission; there is no abject obedience [14] at all, but merely a bargain in many cases. It is to be surmised that it is the connotation of the term, the feeling of servility, that has made the road so hard for a very simple doctrine. The fact that conditions change and a right granted under certain conditions becomes odious in a situation where the same right would not be granted anew; the fact that continued performance of itself is liable to render an obligation obnoxious and burdensome,[15] has led to a harsh interpretation of the term. Moreover, the inheriting of servitude relations by succeeding rulers, relations of obligation they had not contracted, perhaps had received no benefit from, and this against their will, has aggravated the situation.[16] Thus a grant of fishing rights may be very simple when there are plenty of fish and no competition; it may later become a grievous burden.[17]

The point cannot be over emphasized that it is use and not performance that distinguishes a servitude. The proprietary element is essen-

[11] Bello, *Principos*, p. 110; Fiore, *D. I. Codifié;* p. 224, Wilson and Tucker, p. 146.

[12] Davis, Elements, p. 68, for terms.

[13] It is true that certain servitudes are called "positive," but I conceive that such a usage is in conflict with the explicit and settled doctrine (Foignet, *Manuel*, p. 154, "Les servitudes consistent toujours in patiendo, non in faciendo"), that servitudes are never *in faciendo*. For further discussion cf. *infra*, p. 14.

[14] Indeed, no obedience at all, no free power of command in the dominant state.

[15] The psychology of the case certainly has been important, or, to use terms of international relations, servitudes have irritated "national honor."

[16] De Steck, *Ecclaircissemens*, p. 47.

[17] *E. g.*, the North Atlantic Fisheries, *re* England and United States, *q. v.*, Vols. VIII–IX.

tial. As near as may be made out, a servitude is a proprietary right of use by the dominant state, involving a negative restriction of the territorial rights of the servient state.[18]

Such a nature reflects the ancestry of the doctrine.[19] Such was the case at Roman law when servitudes were matters of private law; such was the case in feudal public law. Ere the age of equality and independence among states, many rights over one another's territory were set up. Feudal dues, political disabilities, dynastic allegiances, all contributed to foster the conception. It is questionable if this nature comprising these traits of reality and negativity can survive today.[20] An indication of this is the fact that the servitude in those days was, beside the other two points, normal; while today it is considered abnormal.[21]

The question of the basis of a servitude now becomes pertinent. The state of the law at present seems to be that stated by Hall—"servitudes are creatures not of law but of compact." [22] While the general fundamental social conditions for a servitude may reside in the *situation des choses*, there must be an explicit agreement to establish a right.[23] When means of food supply and transportation were less developed, the need for servitudes of right of way, fishery, wood-cutting and the like was

[18] "A restriction on the free exercise of the jurisdiction of the state in the way of an obligation to allow a foreign state to do a thing, or in the way of an obligation not to do a thing," says Wilson, Handbook, p. 153.

[19] Note that early servitudes were given by a prince over the public land or his private domain quite indifferently. Heffter, p. 106.

[20] II Nys (*Droit Int.*), p. 271, reduces the whole concept to one of obligation, depriving it of its territoriality and negativity, denying the existence of any specific concept,—"*les pretendues* servitudes," he calls them.

[21] Thus it is now said that a state under servitude may not do "ce qu'il pourrait *normalement* accomplir." Despagnet, *Cours de Droit Int.*, p. 185.

[22] *Op. cit.*, p. 43. He excepts a few customary ones. Also Fabres, p. 23.

[23] II Nys, p. 273; Bonfils (p. 181) takes a mid-way position, admitting that a servitude may exist without treaty, but holding that it then derives its force from the *tacit* consent of the state. On the other hand, Bello, *principios*, Vol. I, p. 110, puts the natural servitude down as a "right" and holds conventional servitudes are sheer privileges. The whole thing is a confusion of thought—for the terms "custom, usage, practice" and "international law" are hopelessly mingled. Bluntschli, *D. I. Codifié*, p. 209; Lawrence, Principles, p. 229. Oppenheim, Int Law, 2nd Ed., Vol. I, pp. 280 *seq.*, stands for state consent. So Creasy, Int. Law, p. 257; Wilson, p. 153; Bry, *Droit Int.*, p. 149—who insists also on "possession in fact." Rivier, *Principes*, pp. 295–6; Twiss, Law of Nations, p. 423; III Calvo, *Droit Int.*, p. 356.

great, and the existence of abundant supplies often gave rise to natural servitudes based on custom,[24] enjoyed from time immemorial by the surrounding peoples. But when the peoples of the earth became organized into coherent political entities, this general helping oneself out of the stores of nature was restricted.[25]

So the condition arose when not even a prescriptive servitude was a real right against the hauteur of the independent state unless it be reduced to treaty. Not that the former would be violated, but that it had not full legal status. So, in rough terms, servitudes might be natural or conventional with full legal status reserved for the latter.

In between these there has been inserted a third class of "legal" servitudes consisting of obligations universally recognized by law.[26] The absence of any authoritative law-making or law-issuing body internationally weakens the principle, but if such a body existed the sanction would be given to such obligations as to allow, for example, innocent use of territorial waters. But it seems doubtful if the obligation so recognized is any longer a servitude and, at all events, it may still be "natural" in being founded on natural conditions.

The incongruity of the distinction between natural and conventional servitudes has led frequently to a denial of the existence of the former, at least as servitudes. They were called moral obligations.[27] The law today is in this pass, and such relations are called servitudes only by analogy. The great trouble is that the advocates of state independence do not like to admit that a state can be bound without its consent.[28] There has even been a suggestion that the law is one of "cojuissance" in such cases [29]—a retreat from the law of natural servitudes. Another mode is to screen oneself with the doctrine of imperative necessity.[30] Patently the law is in flux at this point.

[24] Fiore, *Droit Int.*, I, pp. 615 *s.*; who, however, in his revised code, *Nouveau D. I.*, p. 201, admits necessity for express title. Also Wilson, p. 114; Phillimore, Commentaries, p. 391; II Pradier-Fodéré, 397; De Steck illumines the subject by saying that the legal basis of *natural servitudes* (?) by prescription is the law of usucapion applied to servitudes at Roman Law, *q. v.*, p. 45.

[25] Historic aspect presented by Funck-Brentanno, *Précis*, p. 178.

[26] Calvo, *loc. cit.*

[27] Calvo, II, 215, V, 356–7; Bonfils, 181; Hall (158), equivocates.

[28] Pomeroy has the extreme view, *q. v.*, Lectures, p. 378 *s.*

[29] I Pradier-Fodéré, 380

[30] Klüber, 138.

There are really two questions involved, one of motive and one of method. The motive lies in nature: it is the better distribution of the earth's resources; the method in law: contracted servitudes. There is less forceful binding of the weaker by the stronger as the sense of equality rises; [31] but this very sense of equality, in its aspect of *independence*, has militated against the natural servitude based on nature.[32] And the second effect is not so desirable as the first. The result has been to cut down the total number of servitudes greatly,[33] with benefit on one hand if not on the other. At all events methods have been reformed and law and free contract have to a large extent taken the place of compulsion in setting up servitudes. But a new force is setting in which is altering the case again and which must restore what was formerly embraced by the natural servitude. That force is, not to go into the subject more deeply, the recognition of the principles of national insufficiency, international interdependence, and coöperative organization over against the old divisory code of competition.

The question as to who may be the beneficiary of a servitude is more or less academic at the first glance, but it leads to some very vital questions. Historically, it has been one definite state which had forced a concession from another or which had an immemorial right in a boundary sea or forest.[34] Or it might be that the right lay in a certain definite two or three neighboring states to conduct troops across the territory of the servient state. The concession might have been secured by joint attack. So far the beneficiary was definitely named.

But as theory was developed, the beneficiary of a servitude was held to be, in certain cases, any state or states within certain limits; thus any up-stream state or states had the right to shed surface waters [35] to the states below, or any state or states with no seacoast had the right to sail out a river to the sea, through the territory of the state below it on the river.[36] These are fairly obvious and indisputable, although the

[31] Cf. Germany in the 17th century.

[32] This may be traced very clearly in the successive writers: De Steck (1779), Bluntschli (1870); Hall (1880); Nys (1901); Fiore (1911). The great change came 1790–1860 when economic conditions were altering and no law was produced.

[33] Of course, territorial consolidation helped greatly. Hall, 158.

[34] Taylor, Treatise, p. 263; Twiss, 423; Foignet, 154; Bry, 147.

[35] Martens, *Précis*, I, p. 487.

[36] II Nys, 272.

principle involved in the second is important, namely, that the benefaction may be directed according to certain variable conditions.

The question whether a servitude may exist from a state to subordinate princes or principalities or religious orders has been raised, and it is generally agreed that such a relation is not a servitude, but a delegation of power, a matter of domestic constitutional organization,[37] and that a sovereign state cannot rest under a servitude to one of its subject units. Similarly for families or individuals of its own body politic [38] or for other members of a confederation; for families or individuals of another state it is now quite agreed that such a thing can not possibly be a servitude, and any such agreements have not the element of permanence and irrevocability inherent in servitudes.[39] A state can not be so bound. The relations are simply contracts.

The opinion that the two parties must be sovereign and independent is hidden here. But it is so evident that such a theory, if consistently maintained, would result in there being no servitudes at all, inasmuch as complete sovereignty can never in fact be found, that it is not explicitly offered.[40]

The debated point is now to be decided if a servitude may exist from one state to all other states.[41] This involves right of innocent passage, right of approach,[42] and other universal rights. The decision must be left till later; likewise the question of the ultimate beneficiary—whether it is the state or the people. The enjoyment of most modern servitudes rests in the people of the dominant state. This is certainly true in the economic servitude,[43] while in the political servitude it is apparently [44]

[37] Heffter, 106; Klüber, 197 n. (f.). Case of the family of Tour et-Taxis in I Martens, 482.

[38] Klüber, 137; Rivier, 296.

[39] Earlier law was otherwise. Cf. Heffter, 105; Piédelèvre, *Précis*, p. 390, and, for corporations, Bluntschli, 290. Both this case and the preceding depended on the *jus publicum* and never had a standing in international law. Rivier, 295. Now the law is clear; Pradier-Fodéré, 399. Heffter is in doubt in 1883 [cf. p. 106 n. (5)]. Oppenheim and Wilson state the final view: I Oppenheim, 258; Wilson, 146.

[40] Klüber, 138; Crane, Modern State, p. 10.

[41] Suggested by Rivier (p. 301); usually overlooked.

[42] Fabres (p. 82) objects to calling this a servitude because it exists for all nations, but accepts right of visit because it exists only for a few, by stipulation!

[43] Rivier, 301; Pomeroy, 378; Pradier-Fodéré, 398; all of whom go so far as to say that the servitude is from the servient state *to the people* of another state.

[44] II Calvo, 209.

the state as a political unity that enjoys, for example, the right of transit of troops. But suppose a state is under an economic servitude to all the rest of the family of nations. Would it not in reality be under a servitude to all the human race? For, of course, its own inhabitants are not proscribed from the right, let us say, to take fish in those waters. This whole dispute, academic on the surface, leads to many vital points of doctrine. It demonstrates, in its further reaches, that servitudes are deeper in their bases than sovereignty; that, like sovereignty, they are mere mechanisms to distribute the goods of the earth to the people of the earth. The problem here passes out of our field.

Having examined the servitude in regard to four of its characteristic elements, we shall now turn to the question of classification for further light on the subject. Endless attempts have been made to classify existing servitudes. But all such attempts are necessarily incomplete, because they depend on the point of view.[45] Thus, whether we regard servitudes as to their origin or performance determines whether we shall classify them as "natural" or "artificial" or as "positive" and "negative." Moreover, as Holtzendorff, says, in such cases "Beide Gesichtpunkte Können freilich zusammen treffen so dass mit jener theoretischen Unterschneidung nicht viel gewonnen ist." But he then proceeds to set down some classifications of his own which he believes to be "paramount"—as every other classifier does in regard to his own.[46]

However, such a process does have the merit of shedding much light on the concept from many angles and, while no one classification can be final, each adds some information. Thus, with regard to the historical aspect of the case, there are servitudes at Roman law, at public law, at international law, as outlined above, differing slightly from one another and illuminating in their relation of evolutionary sequence the principle back of all servitudes.

Probably the most common classification is that according to form,

[45] Cf. Despagnet, 186, for another fallacy in all classifications. Oppenheim (*q. v.* I, 258) confuses his points of view and so is able to classify all his servitudes twice!

[46] And when the particular servitude eludes the label of a special group, it is called "mixed" and side-tracked!

the division into "positive" and "negative" servitudes,[47] the former of which "consist *in patiendo*, the latter *in non faciendo*." [48] That is, a state is required to permit another state to do within its jurisdiction things which it would ordinarily prevent, or it must refrain from acts ordinarily within its capacity. As was pointed out before, both of these are really negative in that they demand that the servient state *refrain* from action. They have been very badly confused by the terms "passive" and "active" [49] corresponding to "negative" and "positive" respectively. For there are no active servitudes.[50] All are passive; non-action is their essence.

Next to this classification by form, the division according to origin is most common, separating cases into "natural" [51] and "conventional" servitudes. A conventional servitude may, further, be either "compulsory" or "voluntary." [52] If the latter, it is more likely to approach the natural servitude in nature. The pairs of terms: "general" and "international" [53] or "customary" and "contractual" are often used to designate the same distinction. Those which are general, founded on the natural laws of politico-economic co-existence of states and which have their force usually in custom and long-standing, notorious, and uninterrupted usage, are marked off from those which are caused by a special situation and are based, usually, on international contract. The former exist normally between neighboring states while the contractual servitudes have a much wider range.

A fundamental question is involved here, namely, can there be any natural servitudes? And, if so, what is their implication for international law? [54] Very often such servitudes are called "necessary" in

[47] Speaking either from the point of view of servient or dominant; the former is more valid. Cf. Bry, 149; Pradier-Fodéré, 394 *s;* Taylor, 299.

[48] Creasy, 257; Phillimore, 390; I Martens, 483.

[49] Klüber, p. 137, does this.

[50] There is a fundamental reason why,—servitudes are due from a *territory* which can only be passively servient (*i. e.*, be used). Nys in *R. D. I. P.*, 2d series, 1911, Vol. XIII, p. 314. But cf. tribute payment, *supra*, p. 4, note 10.

[51] For a suggestive line of thought connecting the doctrine of innocent passage and that of servitudes cf. Taylor, 263, Twiss, 423.

[52] I Martens, 482.

[53] Wilson, 147.

[54] Thus Fiore disregards them, putting it all on a right of the state to obligate

contradistinction to the "voluntary" compacts. But if a servitude is "voluntary," is it a servitude? [55] Is not the term used phenomenally there to refer to the subsequent psychological effect of long-standing obligations no longer acceptable? Sometimes the necessary servitude is referred to as "permanent," and the voluntary as "temporary;" [56] the former come very near the Civil law concept. The basic distinction really runs between those due to nature and those due to man's action. But, to repeat, this seems to the writer merely a question of motive and method. The *raison d'être* of a servitude is natural, the method conventional.

There are several other divisions which are often made, some of them in analogy to Roman law, and these are usually indicative of outward aspects of operation rather than of essential characteristics. Thus, it matters little to class servitudes as "continuous" or "discontinuous," that is, to point out that some may be exercised at infrequent, disconnected intervals, as the right of transit of troops in time of war, while some are by their very nature, exercised continuously, as the right of the up-stream state to shed its waters to the state below. Oddly enough, the natural servitude is usually continuous and the contractual usually discontinuous.

Similarly descriptive are the distinctions "apparent" and "non-apparent," "urban" and "rural." The latter demarcation has little application in international law, although it did have a measure of significance in the feudal *jus publicum*.[57] More important are the terms "colonial," "frontier," "maritime," and "continental." [58] The apparent and non-apparent servitudes, "those which reveal themselves by external signs and those which do not," except in so far as they relate to natural and contractual relations, in that one set is implicit and the other expressed, have little meaning here.

itself. He says: "Un état peut s'obliger à faire ou à laisser faire.—" Moreover, he does not mean "à faire" for he does not believe in the positivity of servitudes; *q. v. loc. cit.* in *Noveau.*

[55] Fiore says the essence is in "an accord of wills,"—which is quite contrary to the usual notion of unwilling obedience, *q. v. loc. cit.* in *Droit. Int.*

[56] Heffter, 105.

[57] Rivier, *loc. cit.*, treats of them, and Ullmann, *Völkerrecht*, p. 88, treats maritime servitudes extensively.

[58] Klüber, 139.

Finally, the division according to subject-matter is enlightening. Servitudes may be "economic," "military," "political," "private." [59] None of these are exclusive. Indeed, the classifications mapped out here are confessedly descriptive, not limiting. However, it is true that political servitudes and economic private servitudes have divergent bases which might with profit be examined. The early history of the subject in the feudal age saw many more military and political ties than the present.

The fact that such relations may be either mutual or unilateral has already been pointed out.[60] It is significant, for it is doubtful if a mutual servitude is not a contradiction in terms, if the usual definition is retained. There may be two servitudes, but not two phases to one servitude, it would appear.

It should be pointed out that in international law the negative servitudes are more numerous,[61] restrictions on the powers of states having proven more conducive to public benefit than enlargements. Similarly the positive and contractual classes run parallel, as do the negative and customary,[62]—states will not surrender permits to others except at a bargain.

The classification into which any servitude happens to be placed by a given writer has very little to do before the fact with its actual effect. A servitude operates thus and so and is accordingly classed; it is not previously conceived as of a certain nature and then bound to behave in a certain way. Least of all has the theory of the matter affected the practice in the matter of termination, to which we now turn.

The termination of servitudes has received two sorts of treatment.[63] The average life of a servitude is so great, termination is, consequently, so infrequent and occurs at such long intervals that the importance of the subject has escaped all but one or two writers. As a result either

[59] It is implied that the political advantage of the state and the private advantage of the citizens do not always run together. In the end they should; this is in effect a naïve admission of the dubious value of certain forms of political sovereignty. Also Holtzendorff, 95; IX, N. A. F., 313.

[60] Cf. also Heffter, 106.

[61] Bonfils, 181.

[62] Taylor, 299.

[63] Compare Bluntschli and Oppenheim.

the matter has been dismissed in a summary way with a few obvious remarks, or the process has been assimilated to the same process in connection with treaties. Only one exception to this general neglect stands out in the literature of the subject, and this has not been exhausted by any means.[64]

The subject should be prefaced by a remark that, in view of the fact that permanence is supposedly an element in servitudes, it is a little incongruous to speak of termination.[65] But for all this, in view of the fact that permanence is not in fact obtained, the subject is pertinent, the logic notwithstanding.

There are a few obvious ways in which a servitude may end. Thus, confusion or consolidation of the territories would effect it *ipso facto*.[66] There is no dispute here. Similarly the beneficiary state may renounce its rights[67] and the servitude end "by renunciation."[68] This is not certain in the case of "tacit renunciation," for there is no statute of limitations in operation and proof of tacit renunciation by the test of circumstantial evidence, even the overt act test, is unsatisfactory with no regularly sitting court, faulty mechanism of settlement and general lack of judicial mechanism internationally. In respect to the conventional servitudes and, to a certain limited extent, in respect to natural servitudes, agreement of the parties in a treaty may end the relation.[69] Finally, if the relation was for a period, it may end by expiration of time.[70] All of these will apply to conventional servitudes, but if the natural servitude is upheld, then such relations are as permanent as the natural conditions out of which they arise and they are not strictly subject to termination. That is so obvious as not to need proof.

All of these rules are simple. They are often grouped, and it is said that servitudes end "according to the general rules for the termina-

[64] Bluntschli's denunciation theory, *infra*, p. 22.

[65] X, N. A. F., 1427, formulates this.

[66] II Nys, 277; Creasy, 258; Rivier, 296. Called "Suppression of object" by Martens (*q. v.* I, 479). It is said that the subject-matter disappears, but it is more accurate to say that the servitude is no longer necessary to the enjoyment of the right.

[67] Tacitly or explicitly. The former is called "abandon" or "non-use."

[68] Fiore, *Nouveau*, p. 224; Twiss, 423.

[69] II Nys, 276; Creasy, 258; Taylor, 301; Bonfils, 183.

[70] Piédelèvre, 391; Bluntschli, 212. Likewise conditional servitudes end by fulfillment of conditions. *E. g.*, German occupation of France in 1871. Cf. Fabres, 56.

tion of treaties." [71] This seems to be a loose mode of treatment, for the subject-matter of servitudes and of treaties is not identical; and, moreover, there are many servitudes never evidenced by treaty,[72] but which are just as binding as their brothers of better credentials. In regard to them a large problem is opened. Can states by agreement dispose of inherent rights? Can natural law be made subject to political will? [73] At all events treaty rules have been utilized largely.

If servitudes are to be assimilated to treaties,[74] one rule would quite evidently appear to hold, namely, that servitudes being *in rem* are not extinguished by war,[75] but that they run with the land and are merely suspended by war. Similarly a previous servitude would hold over a later one,[76] although the reluctance of states to bind themselves would prevent the multiplicity of such relations, which would make such a rule significant. Again, diminution and impairment would be held rigidly illegal [77] and the case of a regulatory tax levied on the exercise of a servitude would be subject to the old test of reasonable regulation and intent.[78] Minor variations may be neglected, for they will usually be regulated by treaties.[79] Finally, the grant of a servitude would imply the grant of auxiliary rights necessary to enjoyment thereof.[80]

The principle that servitudes run with the land has not been exhausted. If such is the case, then a transfer of land would entail a transfer of the servitude for servient or dominant alike.[81] If it does not hold and servitudes depend from the moral sovereignty of the servient, it must be

[71] Bonfils, 183 fin; Rivier, 296; Fabres, 23.

[72] Right of use of rivers by up-stream states, etc.

[73] The whole theory of obligation at international law is opened here.

[74] That they are not so assimilable but that even if created by treaty, the treaty is swallowed up in the status, is more logical; that is, even if a (so-called) "transitory" treaty creates a servitude, it disappears by passing over into the servitude. Vattel, *Droit des Gens*, p. 220. For a just criticism of this term "transitory" see Westlake, Chapters, p. 61.

[75] Sutton *v.* Sutton in Scott, Cases, p. 427.

[76] Clauss, *Lehre*, 213; Calvo, II, 215.

[77] I Bello, iii.

[78] IX, N. A. F., 399–400.

[79] De Steck, 47.

[80] "Arteopus," quoted in X, N. A. F., 2128–9.

[81] II Pradier-Fodéré, 406; I, N. A. F., 76 (d). The former usually emphasized Fiore, *Nouveau*, p. 116.

shown that constitutional and revolutionary changes do not void the servitudes.[82] Lastly, the defenders of the real basis of servitudes are driven to the old retreat of saying that servitudes are not even suspended by war, but that it is merely the exercise of them that is suspended if conditions warrant it.[83] At all events, servitudes do persist through war, but are usually not actively enjoyed;[84] and constitutional changes do not affect them.

There is a lurking suspicion here that the rule of *rebus sic stantibus* is implied in all servitudes. Such a view has been explicitly maintained.[85] That involves an assimilation of servitudes to treaty procedure, for the rule of *rebus sic stantibus* is still peculiarly an incident of treaty procedure. On the other hand, if they constitute a self-sufficing branch of the fundamental law, they are subject to no such restriction, but must carry their own limitations. Further, if servitudes are a portion of the fundamental law and not voluntary agreement, Bluntschli's theory that a servitude may be denounced when it is pernicious to the well-being of the servient state must be ruled out.[86]

The whole question of denunciation is delicate and complex. Bluntschli's theory has been severely attacked. Nys maintains, further, that negative servitudes are subject to tacit abrogation,[87] while it is held in some parts that a successor may denounce a previously established servitude on his kingdom.[88] This is criticised with little success by Westlake[89] from the argument based on the reality of servitudes. The question is similar to the dispute over treaty denunciation,[90] but not so easily settled, for an agreement must be *rebus sic stantibus*, but a servitude, if part of natural law, can not be.

There is a fertile suggestion that denunciation may be justified when

[82] Held by Martens, I *Précis*, 174; defended by Bluntschli (74) with little legal reasoning, and Calvo II, 215, *re* revolutions.

[83] Clauss, 213; Fabres, 33.

[84] And must be reinstated by a specific clause at the end of that war? Cf. Fabres, 33.

[85] I Oppenheim, 208; Fabres, 30.

[86] Bluntschli, 359.

[87] II Nys, 277.

[88] By Oppenheim and Rivier.

[89] *Q. v.*, p. 61.

[90] Allowed by: Wilson, 87 (g); Hall, 116; Calvo, I, 615.

the servitude relation "would hamper the development of international law." [91] This all depends on whether international law is subject to individual state will or transcends it, and, further, the possibility of the case arising depends on the thesis that international law is developing along lines of state independence rather than state interdependence, which is doubtful. The case of a servitude made for a particular stage in national growth [92] might be easily settled by this rule; not so easy of settlement would appear the case of a punitive servitude imposed by a victor after a war.

To sum up, we may freely admit the extreme confusion pervading the theory of servitudes. Conceived and developed under a system of law where proprietary rights were exceptionally well formulated, they took that form because of the similarity of subject-matter. Extended to extreme degrees in an age of state weakness and feudal dependence, they have encountered strong opposition from the modern sovereign state.[93] The decline of mercantilism has taken away many cases for servitudes; likewise the decline in dynastic intrigue.

It seems possible now to foresee a decline in servitudes as better modes of distributing the goods of the earth are concerned. A greater degree of organization among states in a group of all the nations, a freer system of citizenship exchanges, certain forms of public international regulation, these may fairly be expected to provide the moral obligations which are unsuitable for treatment under the law of servitudes, and also to provide all that was formerly included under that law. The servitude at international law is doomed, first, by reason of the severe blows dealt it by the dogma of sovereignty [94] and independence; second, by the general breakdown of that proprietary competitive system of which (in public, as in private law) it is a part. To it belongs the honor of providing a category suitable to express the beginnings of inter-state dependence; it must yield the consummation of that work to law more flexible, more copious and more effective.

PITMAN B. POTTER.

[91] Bluntschli, *loc. cit.*

[92] French (and other) consular courts in Japan, *e. g.*, for which see Fabres, 106.

[93] There properly is no reason for this. The distinction between sovereignty and jurisdiction, the latter of which is alone alienated or involved in a servitude, is enough to save the face of the state. Cf. Wilson, 153; II Nys, 273; Fiore, 224; and for an erroneous view I Oppenheim, 257.

[94] Cf. I Martens, 479; Internoscia, 293; Klüber, 137.

INTERNATIONAL LAW AS APPLIED BY ENGLAND IN THE WAR

III. THE TREATMENT OF ALIEN ENEMIES

By the common law an alien is a subject of a foreign state who has not been born within the allegiance of the King: he is counted an alien friend if his sovereign or state is at peace, an alien enemy if his sovereign or state is at war with the King. By the Naturalization Act of 1870 an alien may: (1) take, acquire, hold and dispose of real and personal property of every description in the same manner in all respects as a natural-born British subject; (2) after five years' residence in the United Kingdom and on giving proof that he intends to reside in the kingdom or serve under the Crown, obtain a certificate of naturalization by which he becomes entitled to all political and other rights, powers and privileges and subject to all obligations to which a natural-born British subject in the United Kingdom is subject, with the qualification that he may not be deemed a British subject within the limits of the country of his original allegiance, if, according to its laws, he has not ceased to be a subject of that state. (This last provision has been abrogated by the new Nationality Act of 1914, which came into operation in January.)

Naturalized British subjects, therefore, though originally subjects of enemy countries, enjoy under our law the same complete rights in time of war as in time of peace, and the only special restriction placed upon them during the war was their exclusion from the Stock Exchange when it was reopened if they were originally of German or Austrian nationality and had not been denationalized. Alien friends in the United Kingdom enjoy in war as in peace equal rights with British subjects as regards property; they can make contracts and buy and sell movables or immovables, subject only to the law which governs British subjects. It is indeed open to the Crown, which by its prerogative has the supreme control over all aliens in the kingdom, to restrict the normal rights and liabilities which are accorded to them in time of peace when a national

emergency threatens. Magna Carta, the bulwark of English liberties, already lays it down that "all merchants, if they were not openly prohibited before, shall have their safe and sure conduct to depart out of England, to come into England, to tarry in and go through England * * * except in time of war." But in that event the general liberty of entry and movement may be checked; for the safety of the nation prevails then over the other great principle of our polity, equality of opportunity for native and alien traders.

For the better defining and the extension of that power of the Crown, an Act was passed through Parliament on the outbreak of war. The Aliens Act of 1905 had already armed the executive with the means of controlling alien immigration and preventing the landing of undesirable immigrants, but it was found expedient to accord by statute larger powers. The principal object was the regulation of the sojourn of alien enemies in the country; but at the same time the executive desired to be able to impose certain restrictions on aliens generally, and the powers were therefore taken in the under extent.

By Article I of the statute (The Aliens Restriction Act, 1914), it was provided that the King, whenever a state of war existed or there was an occasion of imminent national danger or great emergency might by Order in Council impose restrictions on aliens and make provision (1) for prohibiting aliens from landing or embarking in the kingdom either generally or in certain places; (2) for the deportation of aliens; (3) for requiring aliens to reside and remain within certain places or districts, or prohibiting them from residing in any areas; (4) for requiring resident aliens to comply with the provision as to registration, change of abode, traveling or otherwise; (5) for any other matters which appear necessary or expedient with a view to the safety of the nation. This last compendious clause was subsequently used to serve as the basis for a number of novel restrictions on alien enemies in the kingdom. The Act further provided that a contravention of the regulations in the Order should be punishable by fine up to £100 or imprisonment up to six months. Any provision in the Order in Council under the Act may relate either to aliens in general or any class of aliens. In case of dispute in any proceedings taken under the Act, the onus of proving that a person is not an alien or is not an alien of the particular class is to lie on that person. This pro-

vision is an exception to the general principle of English law that it is for the prosecutor to make out that an accused person is guilty of an offence. The rule of law is not so completely preserved for aliens as for citizens in time of war, and the scheme of the statute was temporarily to set up in England a police supervision over foreigners in the kingdom such as is normal in times of peace in foreign countries.

Together with the Act, an Order in Council was issued on August 5th which filled in the general rules and specified a number of ports at which aliens in general might land or embark, and declared all other ports prohibited. Power, however, was given to an aliens' officer or a Secretary of State to allow an alien friend to land at a prohibited port when he was satisfied that he had arrived there in ignorance of the Order, or to embark there when satisfied that he might be so permitted; and the prohibitions were not to apply to an alien friend who was the master or member of the crew of a vessel in the port. Any alien arriving at an approved port might, however, be refused admittance, if he were suspect, by a Secretary of State or the aliens' officer; and any alien landing or embarking in contravention of the Order might be detained and deemed to be in legal custody. No alien was allowed to bring into the country firearms or explosives, any petroleum spirit and the like in quantities exceeding three gallons; any signalling apparatus, carrier or homing pigeons, a motor car, motor cycle or aircraft, a cipher code, or other means of conducting secret correspondence. Any such articles found in his possession are forfeit as though they were contraband under the Customs Act. But an aliens' officer has power to permit an alien friend to land with any such articles, when he thinks fit. Any alien may be deported by simple order of the Secretary of State; and the master of a ship about to call at a port shall if required receive an alien and his family on board his ship and give them a passage to that port; and if he brought the alien improperly to England he may be compelled to carry him back free of charge.

These provisions are similar to those which apply to aliens normally under the Act of 1905, but with the important differences that the Secretary of State under that Act can only expel aliens who by criminal conduct or the like have proved themselves undesirable, and can only repatriate those who on their application to enter are shown to be un-

desirable in certain definite ways. The special Act gives an uncontrolled discretion to the Prosecutor.

Part II of the Order contains restrictions on resident aliens. Alien friends are required by the order to register themselves if they reside in a prohibited district, *i. e.*, a district specified in the schedule, which included nearly the whole coast line of the kingdom and the areas in which the chief military depots are situate. They must inform the registration officers of any intended change of abode, and when an alien required to register is living with any other person, the duty of furnishing information lies equally on that person. It will be seen later that the obligations of registration for alien enemies are much more stringent; but it is provided that a Secretary of State may, if he thinks it necessary in the interests of public safety, direct that any of the same provisions shall in particular cases be applicable to alien friends. Another general rule prescribes that any person who acts in contravention of the Order or is reasonably suspected of having so acted or being about to act, may be taken into custody without a warrant by an aliens' officer or any constable.

At the instance of the Belgian Government, the English authorities took measures to secure a more complete registration of Belgian refugees than of other alien friends. By an Order issued on December 19th a central register of all such refugees was instituted, and it was provided that any change of residence by a refugee should be notified. Belgians, unlike other alien friends, might not reside either temporarily or permanently in a prohibited district without a permit. The object of the Order was to guard against the abuse of the character of a Belgian refugee for the purpose of spying on behalf of the enemy.

Apart from the provisions in the Aliens' Restriction Order in Council, the only other special disability placed on alien friends during the war was an order of the Admiralty directing that pilotage certificates should not be granted to aliens in respect of the Isle of Wight, Plymouth, Milford, Bristol and Liverpool pilotage districts. This restriction of the normal equality which foreign masters share with British as regards pilotage certificates was obviously justified on considerations of the national security. That dominant interest was also the justification of the exceptional measures prescribed for controlling the landing, em-

barking and residence of aliens, who though not enemies, might be in sympathy with the enemy country and therefore a possible source of danger in the realm.

The liberty of alien enemies in the country was naturally far more seriously affected by the outbreak of war, and the disabilities under which they were placed were more rigorous. Although war according to the modern acceptation is primarily a contest between states and not between the subjects of states, yet it puts an end to the peaceful intercourse between the citizens of the belligerent countries and fundamentally alters the status of subjects of the enemy state resident in the territory of the other. Of old it was held that all such subjects became outlaws in England, and they therefore were liable to be imprisoned or expelled from the realm, while their property could be confiscated. According to Blackstone, writing in the eighteenth century, they have no rights or privileges whatsoever except by the King's special favor, and anybody may seize to his own use such goods as belong to them. "For such enemies, not being looked upon as members of our society, are not entitled during their state of enmity to the benefit or protection of our laws." Yet Magna Carta in the clause already cited asserted a more magnanimous and statesmanlike principle; for, speaking of the foreign merchants, it provides: "If they be of a land making war against us, and be found in our realm at the beginning of the war, they shall be attached without harm of body or goods, until it be known with us or our Chief Justice, how our merchants be entreated therein in the land making war against us: and if our merchants be well entreated there, theirs shall be likewise with us." Accordingly, it has not been the practice of England to imprison alien enemy merchants or subjects generally or to confiscate their property; and the more humane practice, enshrined in our charter of liberties, has been gradually adopted throughout the civilized world; so that there may be said to be a rule of customary international law today against imprisonment or expulsion of alien enemies and forfeiture of their property, movable or immovable. The last occasion on which the outbreak of war was attended with a wholesale seizure of enemy subjects was when Napoleon broke the Treaty of Amiens in 1809 and laid violent hands on the British subjects and their property in France. At the same time, international law recognizes

the right of a belligerent, clearly founded on the first principle of self-preservation, to arrest and intern during the period of war all those subjects of the enemy country within his realm who are of military age or who are able in other ways to assist the enemy country if left at liberty or allowed to depart to their fatherland. The executive of each country decides for itself what persons fall within the class of dangerous citizens, and in the present war the Home Office, acting upon the advice of the military authorities, has placed in concentration camps all German and Austrian subjects residing in or coming into the kingdom who were liable to be called upon for military or naval service, or who were suspected of spying or acting as agents for the enemy governments. About 9,000 were interned in this way. The rest have been allowed to remain, subject to their good behavior and to conditions of residence far more restrictive than those applied to alien friends. As regards their entrance into and departure from the kingdom, they may not land or embark at an approved port without a permit from the Foreign Office, and, though armed with a permit, their embarkation may always be stopped if the authorities consider it necessary for the public safety. As regards their sojourn in the country, they may, on the one hand, be ordered to reside or continue to reside in any place or district, and, on the other hand, they are prohibited from residing, either temporarily or permanently, in any of the areas specified, unless provided with a permit from the local registration officer. They are deprived, therefore, of freedom of movement and freedom of residence. Further, they are required to register their address and furnish the police authorities with a number of particulars, including their occupation, personal description, finger prints, place of business, etc. They may not travel more than five miles from their registered address without a permit, which is generally only valid for 24 hours, but may be good for five days in special circumstances. When an alien enemy has a business address more than five miles from his registered place of residence, he may receive a more extended permit, renewable from time to time. They may not have in their possession, without written permission of the registration officer, any of the articles which aliens are forbidden to bring into the country, and, in addition, any telephone, camera or other photographic apparatus, or military map, chart or handbook. If there is reasonable ground for suspecting

a violation of this rule, a search warrant may be issued by a magistrate or a search of their premises may be ordered, even without a warrant, by a police officer. The circulation among alien enemies of any newspaper or periodical wholly or mainly in their native language is prohibited, unless the permission of a Secretary of State has been obtained; and the publication of any newspaper of the kind is declared to be a contravention of the Order.

While in general the business of an alien enemy is not interfered with, save in so far as the rules against trading with the enemy country apply to them, as to all other persons in the country, they are restrained from carrying on, without express permission, any banking business, or, if they have been engaged in that business, from parting with any money or securities in their bank. The Order further provides that any person who is a member of a firm or a director of a company carrying on banking in the kingdom is to be deemed to be engaged in a banking business. In virtue of these provisions, the branches of German, Austrian and Turkish banks in England received a limited license to carry on a portion of their business, and were placed under government control at the beginning of the war; and the German or Austrian directors of any English banking firms or houses were compelled to retire.

The freedom of meeting which is normally enjoyed by all persons in the kingdom is likewise restricted for alien enemies by a power which is given to the police, on the order of a Secretary of State, to direct the closing of a club habitually frequented by alien enemies, either wholly or during certain hours.

The observance of these regulations is enforced by penalties of fine and imprisonment, which may be incurred not only for direct violation, but for disobedience to aliens' officers, or for aiding and abetting any person in any contravention of the Order.

A number of prosecutions were brought under the Order against aliens who had failed to comply with the conditions of registration or who had failed to disclose that they had in their possession a camera or firearms, or had a telephone installation in their houses. The law, in certain cases, was very strictly pressed, in the case of persons who were technically alien enemies because of their birth in the German or Austrian empires, though they had passed almost all their lives in this country

without, however, being naturalized. Thus, the Bench in the Isle of Wight convicted Col. Herbert, the famous author of the "Defense of Plevna" in which gallant resistance he took a prominent part, for failing to register himself. The accused, who had been a colonel in the English militia, was born before 1866 in Hanover, which was then an independent kingdom. When Hanover became subject to Prussia, he and his family migrated to England, where he had since had his home. Under these circumstances, he could not on English canons of nationality be regarded as owing allegiance to the German Empire, but, on the other hand, he had not obtained British citizenship.

When Turkey joined in the war, the position of the Egyptians in Great Britain was anomalous until the British protectorate was declared over Egypt. They were technically Ottoman subjects and therefore liable to the restrictions imposed upon alien enemies, but it was felt to be harsh to treat them as such and, in practice, they were required only to comply with the formalities of registration, etc., prescribed for alien friends. On the declaration of the British protectorate in December, the anomalous position was cleared up, but the harshness of treating all Ottoman subjects resident in the kingdom as alien enemies still remained, in view of the fact that a large number of Ottomans were notoriously sympathetic to the Allies' cause, and disaffected with the Turkish rule. To place Armenian or Syrian Christians who had come to England for refuge from Turkish oppression in the category of enemies of the country was to disregard facts for a merely technical character, and, accordingly, it was found desirable to modify with respect to such classes the Aliens Restriction Order. A new rule was promulgated in January, 1915, to give them relief, which was to the following effect:

> A registration officer may, subject to the general or special instructions of the Secretary of State, grant to a Turkish subject resident in his registration district, who is shown to his satisfaction to be by race a Greek, Armenian, or Syrian, or a member of any other community well known as opposed to the Turkish *régime*, and to be a Christian, a certificate of exemption from all or any of the provisions of this Part of this Order, except such as apply to alien friends.
>
> Any such certificate shall be operative throughout the United Kingdom, but may be revoked by the registration officer who granted it or by the registration officer of any district in which the holder is for the time being resident.

By the Aliens Restriction Order, alien enemies in fact are placed on the footing of a quasi-criminal class, similar to that of persons on ticket of leave, but, on the other hand, they are permitted to carry on their ordinary vocations and enjoy the ordinary protection for their persons and their property, on complying with the precautional measures which the presence of some 50,000 enemy subjects in the kingdom called for. It may be pointed out that resident aliens are subject to the same law of treason as citizens and, if any part of British territory should be temporarily occupied by the enemy's forces, they will be guilty of high treason if they join or assist them. During the Boer war a Dutch burgher, resident in Natal, who joined a Boer commando which occupied the town in which he lived, was convicted of high treason, and the Privy Council upheld the conviction. The duty of a resident alien, it was said, is so to act that the Crown shall not be harmed by reason of its having admitted him as a resident. He is not to take advantage of the hospitality extended to him against the sovereign who extended it.

One peculiar restriction of their normal liberties was added to the Order in October by an article which provided that an alien enemy should not assume or use or continue to use for any purpose any name other than that by which he was ordinarily known at the date of the commencement of the war. He was likewise prohibited from carrying on any business under a firm name different from that which it had at the beginning of the war. The Order somewhat quaintly declared that the right of a woman marrying an alien enemy after the outbreak of war to use her husband's name was not affected. The feeling against the enemy naturally induced many alien enemies, as well as many naturalized British subjects, to divest themselves of German names. The ordinary law contains no restriction on such a practice, and, in the case of naturalized subjects or alien friends, no attempt was made to check it, but the assumption of new names by alien enemies was likely to make the task of keeping them under supervision and control more difficult, and, therefore, the exceptional prohibition was introduced, and, by a further departure from general canons of law, given retrospective effect.

Another disability which a few German and Austrian subjects incurred in the British Empire on the outbreak of war was the withdrawal of the King's exequatur which had, in certain cases, been granted to

them to act as consular representatives of other foreign Powers within the British dominions or protectorates, or places subject to British occupation or control, such as Egypt and Cypress. An immediate consequence of the hostilities between this country and the enemy states was the breaking off of any diplomatic or consular relations; but enemy subjects in a few cases were the representatives of neutral Powers and, as it was clearly undesirable that they should continue to act in this capacity, a Royal message was issued withdrawing their authority so to act.

If the safety of the state required a considerable restriction of the individual liberties of the alien enemy, it does not demand any general confiscation of his property, such as used to take place, and as in some countries still takes place. It has been seen that Magna Carta clearly holds out protection for the alien enemy merchant in the realm, and with the general recognition of the practice of allowing the alien enemy to continue his residence in the belligerent country there has come the general respect for his proprietary rights. The general rule of war on land is that the public property of your enemy may be confiscated, but the private property of enemy subjects must be respected. Not only the property of resident enemy subjects is immune from seizure, but also the goods and rights on land belonging to enemy persons living in their own country. All trading indeed between persons in England and persons in the enemy country is stopped, and similarly all contracts between parties divided by the line of war are suspended or extinguished. But rights of property remain unaffected, save in so far as the prohibition of trading indirectly affects them. Doubts are expressed in some of the old cases whether an alien enemy can acquire English land in freehold, and the strict rule would seem to have been that land obtained by him would be forfeitable at the instance of the Crown. So too a lease to an alien enemy might be forfeited to the Crown. But the Naturalization Act of 1870 draws no distinction between alien friends and alien enemies as to the right of holding real and personal property and it may be concluded that the Crown's prerogative right to take the lands of an alien has been abrogated. It was indeed declared in certain old English cases that the Crown might seize and appropriate to its own use the choses in action, *i. e.*, the contractual claims and the debts of alien

enemies and enforce their contracts against persons liable on them in the kingdom. But in a case which arose out of the Napoleonic wars Lord Ellenborough held that such a practice which had been enacted against British subjects in Denmark was in his day contrary to the principles of the law of nations, and would not be recognized by our courts. (Wolff *v.* Oxholm, 1817, 6 M. & S. 92.)

In another case, where it was argued that the King may enforce payment of any debt due to an alien enemy from any of his subjects, it was said by the Chief Justice of the Court of Common Pleas: "Such a course of proceeding never has been adopted, nor is it very probable that it ever will be adopted, as well from the difficulties attending it as the disinclination to put in force such a prerogative." (Furtado *v.* Rogers, 1802, 3 B. & P. 192.)

An act, however, was passed at the outbreak of war to enable the Board of Trade (1) to avoid or suspend any patent or license or the registration of any design or trademark belonging to an enemy, (2) to avoid or suspend any application of an alien enemy for the grant of a patent or such registration, and (3) to grant to British subjects on certain conditions licenses to make, use or sell patented inventions and registered designs (but not, it may be noted, trademarks) liable to avoidance or suspension. (4 and 5 George V, Chap. 26, amended by Chap. 73.) It was provided in the amending act that a subject of any state at war with England should include any company of which the business is managed or controlled by enemy subjects or is carried on wholly or mainly for their benefit, notwithstanding its registration within the British dominions. On the face of it, this enactment would seem to provide for confiscation of a particular kind of enemy's property; but, if examined carefully and in the light of the rules issued under it by the Board of Trade, this will appear not to be the case. According to these rules, the applicant for incorporation must prove to the satisfaction of the Comptroller General (a) that he intends to manufacture the patented article or carry on the patented process and (b) that it is in the general interests of the country or of a section of the community or of a trade that the article should be manufactured or the process carried on. The Board may, at any time, in their absolute discretion, revoke any avoidance or suspension ordered by them. The purpose of the statute, in

fact, was to protect the industry and commerce of the country by providing for the continuation of a privileged industry which the original patentee or registered proprietor could not himself carry on during the period of the war. The alien's property in the patent or design was not confiscated any more than his property in contracts which were suspended by the war; but his capacity to use the privilege (which was accorded solely with a view to the public benefit through the exploitation of the invention) being for the time interrupted, power was taken to protect the public without injuring him by allowing a British subject to carry on the manufacture, when it could be shown that the subject matter of the patent or design was a thing of general benefit. The proceedings taken under the act proves that this and not any design against the enemy's subjects was the policy of the Board of Trade, as also does an order issued by the Board empowering an agent to pay the necessary fees in England for the purpose of procuring or renewing for an alien enemy a patent or registered design which was in danger of expiring during the war.

Another example of the restriction of normal property rights which, on broad considerations of public policy, was applied to alien enemies during the war, is concerned with the position of German and Austro-Hungarian subjects with reference to probates and letters of administration during the war. By an order issued by the President of the Probate Division of the High Court, no probate of a will or letters of administration of the estate of any enemy subject, wherever resident, could be granted in respect of any assets in England, without the express license of the Crown. Any grant was to be made upon the condition that no part of the assets should be paid during the war to any beneficiary or creditor who was an enemy subject, wherever resident, or to anyone on his behalf, or to or for any person resident in the enemy country without the express sanction of the Crown acting through the Treasury. But it was stated that on an application to the Solicitor of the Treasury, the sanction could be obtained in proper cases to the payment of a moderate sum from the assets to enemy subjects resident in this country at the commencement of the war or during the war. Here again, the purpose was not in any way to confiscate the rights of enemy subjects in a succession opened during the war, but simply to prevent any wealth

passing from England to the enemy country which might strengthen the enemy's powers of resistance. The payment was postponed until the Treasury were satisfied that the property could not find its way out of England.

The alien enemy's rights of property were maintained, but his rights of action were suspended during hostilities. In some of the old cases, it is laid down that an enemy subject, whether resident in the realm or not, is entirely outside the law, unless he has a special license from the King or comes under a flag of truce, and therefore that he can not pursue or defend any rights before the courts. But as early as the seventeenth century it was held that a license to an alien enemy to reside within the realm imports also a license to trade, and confers upon the alien enemy so long as he remains here the rights and status of an alien friend. (Wells *v.* Williams, 1 Salk. 46.) Chief Justice Treby said there that "wars at this day are not so implacable as heretofore and therefore an alien enemy who is here under protection may sue his bond or contract, but an alien enemy abiding in his own country can not sue here." It was held too during the Napoleonic wars that a prisoner set free on parole who had entered into a contract of employment with an Englishman could sue the employer for wages during the war, because he was under the protection of the King. (Maria *v.* Hall, 1 Taunt. 33.) There was, however, some doubt whether registered alien enemies in the present war were entitled to bring and defend actions before the courts, on the ground that the registration implied a license. When the question was raised in an action brought on for hearing in October by the Princess Thurn and Taxis, an Austrian subject, the High Court held that registered alien enemies, being in England by tacit permission of the Crown, might sue, and the Court of Appeal subsequently upheld that view. The Court of Appeal considered together a number of questions relating to the capacity of alien enemies to sue or to be sued, and reached several important conclusions in a judgment delivered in January, 1915. (Porter *v.* Freundenberg.) An unregistered alien enemy, or any person resident in the enemy country even though of English nationality, was under the disability to invoke the aid of the courts during war. They held that Article 23-h of the Hague Convention on the Laws of War on Land could not be treated as affecting the abrogation of the old rule of the

English common law, but only prohibited any declaration by a military commander in the occupation of an enemy's territory, which would prevent the inhabitants from using their courts of law to assert or protect their rights. An alien enemy, therefore, could not sue in our courts unless he had a license, express or implied, to remain in the country. On the other hand, there was no reason of public policy which prevented an alien enemy being sued during the war by British or neutral subjects. To hold otherwise would be to injure innocent people and convert what was a disability of the enemy into a relief. The court approved a judgment confirming the liability of the enemy to be sued. (Robinson *v.* Continental Insurance Co. of Mannheim.) If the alien enemy could be sued, it followed that he could appear and be heard in his defense, as had been laid down in certain American decisions given during the Civil War. The court gave directions as to service of the writ in such cases upon the defendant, which would secure that he had notice of the proceedings. As regards the right to appeal during the war, if the judgment was given against the alien enemy, the appellate courts were open to him as to any other defendant, but if he had been unsuccessful as plaintiff in an action heard before the war he could not proceed during the war with an appeal; once hostilities had begun he could not be heard in proceedings in which he was setting the court in motion; the right of appeal would be suspended till after the restoration of peace.

In a later case, it was held that when an alien enemy and a British firm were co-plaintiffs, the right of action and appeal were suspended during the war; and the enemy firm could not be struck out of the proceedings at the instance of the respondent, so as to let the action proceed between the other parties. (Actien-Gesellschaft für Anilin-Fabrikation and Mersey Chemical Works, Ltd., *v.* Levinstein, Ltd.) The friendly or enemy character of a company for the purpose of suing in the courts was held to depend upon the same criterion as that fixed for the purpose of preventing trade with the enemy, the country of incorporation. If a company were registered in England, it was immaterial that its shareholders were largely German. In law it was an English person and therefore entitled to full rights of suit. This point was laid down in a judgment of the Divisional Court reviewing a decision of the City of London Judge, who had found for the defendants in an action brought

against them for goods sold and delivered by a company which had a large enemy interest. (Amorduct Manufacturing Co. *v.* Defries & Co.) The company had its office in London and its factory at Birmingham, but a large part of its shares were held by alien enemies living in Germany and the remainder by a naturalized German living in England. It was urged that the plaintiffs were precluded from maintaining the action, by reason of the nationality of a majority of the shareholders, and the Judge of the City of London Court upheld this plea and declared it would be against public policy to allow the company to receive money from an English firm. The High Court, however, overruled the decision on the ground that the company was a different entity from its shareholders and could both trade and sue in England as an English person. The Court of Appeal laid down the same principle in the case of the Continental Tyre Company *v.* Tilling, when a company registered in England but composed almost entirely of German shareholders sued an English firm on a bill of exchange accepted by it on account of goods supplied before the war. Buckley, L. J., dissented from the judgment on grounds of public policy, being of opinion that the law in such cases should look to the substance and not to the form of the character of the company.

The branch in English territory of an enemy firm was likewise held liable to sue and be sued as an English person during the war. A pretty question of the kind was decided by the court on a claim brought by an English firm of solicitors against the branch of a German bank which was licensed to carry on business in England. (Plunkett and Leader *v.* Disconto-Gesellschaft.) The plaintiffs had an account with the principal German house at Berlin and on August 1st applied for payment of the balance standing to their credit. The bank refused payment, and when war supervened it became, of course, impossible to enforce it by action in Germany. They therefore brought a suit for the amount due against the defendant branch, who entered an appearance, but pleaded that they were not liable (1) because of the moratorium proclamation and (2) because the debt was due from the head office and they were unable to get any instructions from the head office. The court held that the branch was properly sued and that the moratorium proclamation did not apply because the payment due was in respect of a debt, incurred outside the

kingdom, for a firm whose principal place of business was outside the British Isles. By the proclamation of August 6th, the postponement of payment was expressly not extended to such debts; and, though the branch was not the party primarily responsible, its funds were liable to satisfy English creditors of the principal house when they could not obtain their rights otherwise. In a subsequent case, the court held that the London branch of the Dresdner Bank was not liable to pay the amount of a credit of an English firm at the Berlin head office, distinguishing the earlier decision on the ground that there a request for payment had been made to the German house. (Clare & Company *v.* Dresdner Bank.)

While the English common law courts refused to abrogate the old practice of our common law which deprived the alien enemy of the right of suit, the Prize Court upheld on grounds of broad justice the enemy's right to appear for the purpose of urging considerations in defense of his property under an alleged rule of international law which would protect it from confiscation in prize proceedings. Under the old English prize law the alien enemy was generally not allowed to appear in the court to argue his case. He was deemed, as Lord Stowell put it in a famous case (*The Hoop*) to be *ex lex*, outside the protection of the law, unless particular circumstances discharged him for the nonce, or, as the lawyers say, *pro hac vice* from the enemy character, such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority which puts him in the King's peace. But when this principle was laid down there were scarcely any circumstances other than those mentioned in which the property of the alien enemy taken at sea was not liable to confiscation; whereas today, in virtue of a number of international conventions, the belligerent's right of capture has been considerably restricted. He may no longer seize the enemy's goods on neutral vessels, or capture small fishing boats, or confiscate enemy vessels lying in his own ports at the outbreak of war. In all these cases, therefore, the enemy owner might desire to set up a legal plea before the court, if proceedings were taken against his property in the Prize Court, and the practice of other nations, including that of the United States of America during the Spanish-American War and of Japan and Russia during the Russo-Japanese War, has tended toward relaxing the old international

rule of excluding enemy subjects from the courts. Accordingly, in an important prize case (*The Möwe*), decided early in this war, the President of the court, in order, as he said, to justify a conviction of fairness as well as to promote just and right decisions, made a rule of practice that whenever an alien enemy conceives that he is entitled to any protection, privilege or relief under any international convention, he shall be entitled to appear as a claimant and to argue his claims before the court. The attitude of the British Prize Court to the enemy which, it is submitted, will likewise be the attitude of every British court, was admirably stated in the course of the judgment, in words which form a fitting conclusion to the consideration of the enemy subject's rights in England, when the strain of war weighs upon the even balance of justice:

> The practice should conform to sound ideas of what is fair and just. When a sea of passions rises and rages as a natural result of such a calamitous series of wars as the present, it behooves a court of justice to preserve a calm and equable attitude in all controversies which come before it for decision, not only where they concern neutrals, but also where they may affect enemy subjects. In times of peace the Admiralty Courts of this realm are appealed to by people of all nationalities who engage in commerce upon the seas, with a confidence that right will be done. So in the unhappy and dire times of war the Court of Prize as a court of justice will, it is hoped, show that it holds evenly the scales between friend, neutral, and foe.

It is doubtful whether the old common law rule excluding alien enemies from suing in the King's courts during the war might not be completely abrogated in our day without any injury to the public weal. The change would require legislation, but it is submitted that legislation with this aim would bring our law into more complete accord with the progressive ideas of international law. There may be circumstances in which the denial of the right of action involves loss of property, and the spirit of the modern law of war is that the proprietary rights of enemies in the belligerent country are to be preserved during the war. What the interests of the belligerent state demand is that no wealth should be sent from any person in its territory to any person in the enemy territory, and it would therefore be necessary to require any sum awarded by a judgment to an alien enemy to be paid into court. But it would be possible to secure this condition while leaving the courts open in war as in peace to do justice between all persons who have rights to assert or defend.

NORMAN BENTWICH.

EDITORIAL COMMENT

THE RESIGNATION OF MR. BRYAN AS SECRETARY OF STATE

On June 8, 1915, the Honorable William Jennings Bryan resigned the Secretaryship of State of the United States, owing to a disagreement with the President and the Administration as to the attitude which the United States should take with Germany in the discussion and settlement of the case of the *Lusitania*, a British passenger and mail steamer which was on May 7, 1915, on its way from New York to Liverpool, torpedoed and sunk off the coast of Ireland, causing the loss of over one thousand persons, including therein more than one hundred American citizens, of the two thousand persons on board at the time of the destruction of the vessel.

Mr. Bryan's letter of resignation, dated Washington, June 8, 1915, is as follows:

My dear Mr. President:

It is with sincere regret that I have reached the conclusion that I should return to you the commission of Secretary of State, with which you honored me at the beginning of your Administration.

Obedient to your sense of duty and actuated by the highest motives, you have prepared for transmission to the German Government a note in which I cannot join without violating what I deem to be an obligation to my country, and the issue involved is of such moment that to remain a member of the Cabinet would be as unfair to you as it would be to the cause which is nearest my heart, namely, the prevention of war.

I, therefore, respectfully tender my resignation, to take effect when the note is sent, unless you prefer an earlier hour.

Alike desirous of reaching a peaceful solution of the problems, arising out of the use of submarines against merchantmen, we find ourselves differing irreconcilably as to the methods which should be employed.

It falls to your lot to speak officially for the nation; I consider it to be none the less my duty to endeavor as a private citizen to promote the end which you have in view by means which you do not feel at liberty to use.

In severing the intimate and pleasant relations, which have existed between us during the past two years, permit me to acknowledge the profound satisfaction which it has given me to be associated with you in the important work which has come before the State Department, and to thank you for the courtesies extended.

With the heartiest good wishes for your personal welfare and for the success of your Administration, I am, etc., etc.

To this letter of Mr. Bryan, President Wilson thus replied under date of June 8, 1915:

My dear Mr. Bryan:

I accept your resignation only because you insist upon its acceptance; and I accept it with much more than deep regret, with a feeling of personal sorrow.

Our two years of close association have been very delightful to me. Our judgments have accorded in practically every matter of official duty and of public policy until now; your support of the work and purposes of the Administration has been generous and loyal beyond praise; your devotion to the duties of your great office and your eagerness to take advantage of every great opportunity for service it offered have been an example to the rest of us; you have earned our affectionate admiration and friendship. Even now we are not separated in the object we seek, but only in the method by which we seek it.

It is for these reasons my feeling about your retirement from the Secretaryship of State goes so much deeper than regret. I sincerely deplore it.

Our objects are the same and we ought to pursue them together. I yield to your desire only because I must and wish to bid you Godspeed in the parting. We shall continue to work for the same causes even when we do not work in the same way.

With affectionate regard, etc., etc.

On June 10th Mr. Bryan issued a formal statement of his position, defining in detail the methods of effecting a peaceful settlement as to which Mr. Bryan had said in his letter of resignation, "we find ourselves differing irreconcilably." This statement follows:

My reason for resigning is clearly stated in my letter of resignation, namely, that I may employ as a private citizen, the means which the President does not feel at liberty to employ. I honor him for doing what he believes to be right, and I am sure that he desires, as I do, to find a peaceful solution of the problem which has been created by the action of the submarines.

Two of the points on which we differ, each conscientious in his conviction, are:

First, as to the suggestion of investigation by an international commission, and

Second, as to warning Americans against traveling on belligerent vessels or with cargoes of ammunition.

I believe that this nation should frankly state to Germany that we are willing to apply in this case the principle which we are bound by treaty to apply to disputes between the United States and thirty countries with which we have made treaties, providing for investigation of all disputes of every character and nature.

These treaties, negotiated under this Administration, make war practically impossible between this country and these thirty governments, representing nearly three-fourths of all the people of the world.

Among the nations with which we have these treaties are Great Britain, France and Russia. No matter what disputes may arise between us and these treaty nations, we agree that there shall be no declaration and no commencement of hostilities until the matters in dispute have been investigated by an international commission, and a year's time is allowed for investigation and report. This plan was offered to all the nations without any exceptions whatever, and Germany was one of the nations that accepted the principle, being the twelfth, I think, to accept.

No treaty was actually entered into with Germany, but I cannot see that that should stand in the way when both nations indorsed the principle. I do not know whether Germany would accept the offer, but our country should, in my judgment, make the offer. Such an offer, if accepted, would at once relieve the tension and silence all the jingoes who are demanding war.

Germany has always been a friendly nation, and a great many of our people are of German ancestry. Why should we not deal with Germany according to this plan to which the nation has pledged its support?

The second point of difference is as to the course which should be pursued in regard to Americans traveling on belligerent ships or with cargoes of ammunition.

Why should an American citizen be permitted to involve his country in war by traveling upon a belligerent ship, when he knows that the ship will pass through a danger zone? The question is not whether an American citizen has a right, under international law, to travel on a belligerent ship; the question is whether he ought not, out of consideration for his country, if not for his own safety, avoid danger when avoidance is possible.

It is a very one-sided citizenship that compels a government to go to war over a citizen's rights and yet relieve the citizen of all obligations to consider his nation's

welfare. I do not know just how far the President can legally go in actually preventing Americans from traveling on belligerent ships, but I believe the Government should go as far as it can, and that in case of doubt it should give the benefit of the doubt to the Government.

But even if the Government could not legally prevent citizens from traveling on belligerent ships, it could, and in my judgment should, earnestly advise American citizens not to risk themselves or the peace of their country, and I have no doubt that these warnings would be heeded.

President Taft advised Americans to leave Mexico when insurrection broke out there, and President Wilson has repeated the advice. This advice, in my judgment, was eminently wise, and I think the same course should be followed in regard to warning Americans to keep off vessels subject to attack.

I think, too, that American passenger ships should be prohibited from carrying ammunition. The lives of passengers ought not to be endangered by cargoes of ammunition whether that danger comes from possible explosions within or from possible attacks from without. Passengers and ammunition should not travel together. The attempt to prevent American citizens from incurring these risks is entirely consistent with the effort which our Government is making to prevent attacks from submarines.

The use of one remedy does not exclude the use of the other. The most familiar illustration is to be found in the action taken by municipal authorities during a riot. It is the duty of the mayor to suppress the mob, and to prevent violence, but he does not hesitate to warn citizens to keep off the streets during the riots. He does not question their right to use the streets, but for their own protection and in the interest of order he warns them not to incur the risks involved in going upon the streets when men are shooting at each other.

The President does not feel justified in taking the action above stated. That is, he does not feel justified, first, in suggesting the submission of the controversy to investigation, or, second, in warning the people not to incur the extra hazards in traveling on belligerent ships or on ships carrying ammunition. And he may be right in the position he has taken, but as a private citizen I am free to urge both of these propositions, and to call public attention to these remedies in the hope of securing such an expression of public sentiment as will support the President in employing these remedies, if, in the future, he finds it consistent with his sense of duty to favor them.[1]

On June 11th Mr. Bryan issued a further statement on what he called the real issue, addressed to the American people. This statement follows, as it explains in Mr. Bryan's own words the convictions which caused him to oppose the President's policy and to surrender the Secretaryship of State rather than to surrender his convictions:

You now have before you the text of the note to Germany—the note which it would have been my official duty to sign had I remained Secretary of State. I ask

[1] The *New York Times*, Thursday, June 2, 1915, page 2.

you to sit in judgment upon my decision to resign rather than to share responsibility for it.

I am sure you will credit me with honorable motives, but that is not enough. Good intentions could not atone for a mistake at such a time, on such a subject, and under such circumstances. If your verdict is against me I ask no mercy; I desire none if I have acted unwisely.

A man in public life must act according to his conscience, but, however conscientiously he acts, he must be prepared to accept without complaint any condemnation which his own errors may bring upon him; he must be willing to bear any deserved punishment, from ostracism to execution. But hear me before you pass sentence.

The President and I agree in purpose; we desire a peaceful solution of the dispute which has arisen between the United States and Germany. We not only desire it, but, with equal fervor, we pray for it; but we differ irreconcilably as to the means of securing it.

If it were merely a personal difference, it would be a matter of little moment, for all the presumptions are on his side—the presumptions that go with power and authority. He is your President, I am a private citizen without office or title—but one of the one hundred million of inhabitants.

But the real issue is not between persons, it is between systems, and I rely for vindication wholly upon the strength of the position taken.

Among the influences which governments employ in dealing with each other there are two which are preëminent and antagonistic—force and persuasion. Force speaks with firmness and acts through the ultimatum; persuasion employs argument, courts investigation, and depends upon negotiation. Force represents the old system—the system that must pass away; persuasion represents the new system—the system that has been growing, all too slowly, it is true, but growing for 1,900 years. In the old system war is the chief cornerstone—war, which at its best is little better than war at its worst; the new system contemplates an universal brotherhood established through the uplifting power of example.

If I correctly interpret the note to Germany, it conforms to the standards of the old system rather than to the rules of the new, and I cheerfully admit that it is abundantly supported by precedents—precedents written in characters of blood upon almost every page of human history. Austria furnishes the most recent precedent; it was Austria's firmness that dictated the ultimatum against Serbia, which set the world at war.

Every ruler now participating in this unparalleled conflict has proclaimed his desire for peace and denied responsibility for the war, and it is only charitable that we should credit all of them with good faith. They desired peace, but they sought it according to the rules of the old system. They believed that firmness would give the best assurance of the maintenance of peace, and, faithfully following precedent, they went so near the fire that they were, one after another, sucked into the contest.

Never before have the frightful follies of this fatal system been so clearly revealed as now. The most civilized and enlightened—aye, the most Christian—of the nations of Europe are grappling with each other as if in a death struggle. They are sacrificing the best and bravest of their sons on the battlefield; they are converting their gardens into cemeteries and their homes into houses of mourning; they are taxing the wealth of to-day and laying a burden of debt on the toil of the future;

they have filled the air with thunder-bolts more deadly than those of Jove, and they have multiplied the perils of the deep.

Adding fresh fuel to the flame of hate, they have daily devised new horrors, until one side is endeavoring to drown noncombatant men, women, and children at sea, while the other side seeks to starve noncombatant men, women, and children on land. And they are so absorbed in alternate retaliations and in competitive cruelties that they seem, for the time being, blind to the rights of neutrals and deaf to the appeals of humanity. A tree is known by its fruit. The war in Europe is the ripened fruit of the old system.

This is what firmness, supported by force, has done in the Old World; shall we invite it to cross the Atlantic? Already the jingoes of our own country have caught the rabies from the dogs of war; shall the opponents of organized slaughter be silent while the disease spreads?

As an humble follower of the Prince of Peace, as a devoted believer in the prophecy that "they that take the sword shall perish with the sword," I beg to be counted among those who earnestly urge the adoption of a course in this matter which will leave no doubt of our Government's willingness to continue negotiations with Germany until an amicable understanding is reached, or at least until, the stress of war over, we can appeal from Philip drunk with carnage to Philip sobered by the memories of an historic friendship and by a recollection of the innumerable ties of kinship that bind the Fatherland to the United States.

Some nation must lead the world out of the black night of war into the light of that day when "swords shall be beaten into plowshares." Why not make that honor ours? Some day—why not now?—The nations will learn that enduring peace cannot be built upon fear—that good-will does not grow upon the stalk of violence. Some day the nations will place their trust in love, the weapon for which there is no shield; in love, that suffereth long and is kind; in love, that is not easily provoked, that beareth all things, believeth all things, hopeth all things, endureth all things; in love, which, though despised as weakness by the worshippers of Mars, abideth when all else fails.[2]

Opinions differ as to the wisdom of Mr. Bryan's resignation, when he agreed with the President as to the object but differed only as to the means of carrying it into effect; and opinions likewise differ as to the propriety of explaining in detail his reasons for resigning at a time of great tension with Germany, and indeed before the *Lusitania* note which Mr. Bryan refused to sign had been received at Berlin or made public by either government. Without expressing any opinion on these difficult and perplexing questions, about which the wisest seem to differ, and without discussing the question raised by Mr. Bryan of the propriety of Americans traveling on belligerent ships or with cargoes of ammunition, it should be said, in fairness to Mr. Bryan, that he believed the Administration to be *legally* bound by the principle incorporated in the thirty

[2] The *New York Times*, Friday, June 11, 1915, page 1.

commission of inquiry treaties negotiated by him as Secretary of State, twenty-eight of which have been duly approved by the Senate and proclaimed by the President of the United States; and that the Administration was *morally* bound to apply the principle of the commission of inquiry treaties to disputes with other nations which, like Germany, were not parties to actual treaties, but had accepted them in principle. Regarding this contention there is also much difference of opinion; but again it should be said, in fairness to Mr. Bryan, that he accepted the Secretaryship of State with the understanding that he should negotiate commission of inquiry treaties with the Powers willing to conclude them, and that the authorization so to do influenced him to accept the Secretaryship of State, as Mr. Bryan has stated on more than one occasion to the writer of this editorial comment before the *Lusitania* incident occurred.

The commission of inquiry treaties are themselves the subject of much discussion. Many believe—and the writer of this comment shares the belief—that the treaties are very important documents, especially the series based upon the treaty between the Netherlands and the United States. That treaty, it will be recalled, provides that all disputes not covered by arbitration treaties or agreements, or not submitted to arbitration, shall, upon the failure of diplomacy, be submitted for investigation and report to a permanent commission of inquiry; that the international commission may, without the request of either government offer its services; that the governments shall furnish the international commission with the means and facilities required for its investigation and report; that the commission shall have a year in which to complete its report, unless the time be extended; and that the report when presented does not bind the nations to comply with its terms, as it is specifically stated in Article 3 of the treaty that "The high contracting parties reserve the right to act independently on the subject-matter of the dispute after the report of the commission shall have been submitted." That is to say, if treaties of arbitration exist, covering a particular dispute, then the controversy is to be arbitrated according to the treaty of arbitration, or if there be a treaty providing a different method of solution, then that method is to be followed. If, however, the disputes have not been actually referred to arbitration or the particular method followed agreed upon in other treaties, then the question is to be referred to the investigation and report of a commission whose composition is known in advance and whose members are appointed in ad-

vance of the controversy. The nations show their good faith by agreeing not to declare or to begin hostilities during the investigation or before the report is submitted, as it would be both a farce and a scandal to submit the question to the commission and, during the course of its investigation, to resort to arms. The report will only be complied with if public opinion forces compliance, and this can only be the case if the report itself is so carefully drafted and considered as to enlist public opinion in its behalf.

To those who believe that physical force both generates and sanctions law these treaties are sorry performances. To those who believe that public opinion both generates and sanctions law these treaties will seem to mark the beginning of a better day.

Mr. Bryan entered the Department of State to do a certain thing, and he did it. It is for time to determine whether it was worth doing and whether he did it well.

THE CONTROVERSY BETWEEN THE UNITED STATES AND GERMANY OVER THE USE OF SUBMARINES AGAINST MERCHANT VESSELS

Important questions of international law and humanity have been raised during the last few months by the repeated and relentless attacks of German submarine torpedo boats upon merchant vessels found within the war zone prescribed in the proclamation of the German admiralty of February 4, 1915. While the whole civilized world has a vital interest in the solution of these questions, the United States, as the leading and most seriously affected neutral nation, has protested in a series of impressive and statesmanlike diplomatic documents, and has vigorously maintained the protest made to Germany against the carrying out of the threats against merchant shipping visiting the war zone as far as American ships and lives are concerned.

The German proclamation of February 4th announced that every enemy ship found within the war zone would be destroyed, that neutral ships found therein would be exposed to danger from accidents and from mistaken identity because of the misuse of neutral flags by enemy ships, and that the measures to make the proclamation effective would be carried out even if they endangered the lives of the passengers and crew. In the execution of the proclamation, several incidents have occurred which have brought Germany and the United States to the verge at least, of the severance of diplomatic relations.

On March 28, 1915, the British steamer *Falaba* with 160 passengers and 90 in the crew was sunk by a torpedo fired from a German submarine, resulting in the death of 111 of the persons on board, including one American.

On April 28th the American steamer *Cushing*, bound from Philadelphia to Rotterdam with a cargo of petroleum and oil, was bombarded by bombs from a German airship but apparently without effect, as the steamer was able to proceed to her destination.

On May 1st the American oil tank steamer *Gulflight*, bound from Port Arthur, Texas, to Rouen, France, was torpedoed by a German submarine, resulting in damage to the ship and the death of the captain and two of the crew. The steamer was subsequently taken into a British port.

On May 7th one of the largest passenger ships in the world, the British steamer *Lusitania*, was torpedoed while bound from New York to Liverpool with 1,959 persons on board, and sunk with a loss of over 1,198 souls, including 124 American citizens.

It will be noted that the German proclamation applied to both enemy and neutral vessels; that the destruction of the former was to be intentional and deliberate while the latter were warned against accidents from mines, as subsequently explained, and attacks by mistake. The foregoing incidents included the deliberate sinking by torpedoes of belligerent merchant vessels, upon which American citizens were being carried as passengers, and attacks upon American vessels by a submarine and airships. Neither of the attacks upon the latter vessels could be attributed to accidental contact with mines, and in order to bring them within the provisions of the German warning, Germany alleged that they resulted from mistaken identity.

In the ensuing correspondence the United States has maintained that the high seas are free; that American citizens have a right to take their ships and to travel wherever their legitimate business calls them upon the high seas; and that the proclamation and warning issued by Germany cannot operate as in any degree an abbreviation of these rights. The United States refuses to admit that, unless a blockade is proclaimed and effectively maintained, a belligerent has any right to interfere with neutral vessels except to exercise the right of visit and search and to subject the vessel and cargo to the recognized legal consequences which follow the establishment through the process of visit and search of the belligerent nationality of the vessel or the contraband character of its

cargo. To attack and destroy merchant vessels on sight the United States regards as "unprecedented in naval warfare," and the destruction of American lives upon merchantmen "an indefensible violation of neutral rights." Concerning the threatened dangers to neutral vessels because of the alleged misuse of neutral flags, the United States holds that the suspicion that enemy ships are using neutral flags improperly cannot create a just presumption that all ships traversing the prescribed area are subject to the same suspicion, and points out that the right of visit and search is recognized as legitimate and necessary in order to determine such questions.

Germany makes a general defense of the war zone proclamation and submarine activities first, as acts of retaliation against her enemies, secondly, as justified by the neutrals' toleration of Great Britain's interference with their commerce with Germany; thirdly, as the means of stopping her enemies' supply of war materials from neutrals, which the neutral governments have failed to suppress; and, finally, because Germany's warning was given in ample time for neutrals to avoid the war zone, and she is therefore relieved of responsibility for "accidents" within the zone.

As to these propositions the United States replies that "a belligerent act of retaliation is *per se* an act beyond the law, and the defense of an act as retaliatory is an admission that it is illegal"; that however justifiable such acts may be thought to be against an enemy, they are manifestly indefensible if they deprive neutrals of their acknowledged rights; that the policy of the belligerents with reference to neutral trade can only be discussed with those governments and is irrelevant to Germany's violation of American rights; that the United States is not open to any charge of unneutral action to justify acts of retaliation against it; and, finally, that no warning that an illegal and inhuman act will be committed can possibly be accepted as an excuse for that act or as an abatement of the responsibility for its commission.

In answer to America's demands that Germany legitimately establish through visit and search, her right to deal with merchant vessels, the latter government contends, with reference to enemy ships, that the distinction between merchantmen and warships has been obliterated by the order to British merchantmen to arm themselves and to ram and otherwise to resist German submarines; that it would be dangerous for German submarines to attempt to visit and search them and they are therefore not in a position to observe the rules of capture; that neutral

persons who travel upon such enemy merchantmen thereby expose themselves to the dangers of war, and that accidents which befall neutrals on such ships in the war zone are not different from accidents to which neutrals are exposed in the seat of war on land, whenever they betake themselves into dangerous localities in spite of previous warnings. Germany declines to admit that the presence of American citizens on board enemy ships can protect such ships from attack, and in order to furnish adequate facilities for the traveling of Americans across the Atlantic Ocean under the American flag, she suggested an agreement between the two governments for the transfer to the American flag of a number of neutral passenger steamers and, if necessary, of four enemy passenger steamers.

With reference to the visit and search of neutral vessels, Germany holds that while it is not her intention deliberately to attack and destroy such vessels, the disguising of British ships under neutral flags makes it difficult for the German submarines to recognize neutral vessels, and the danger to which the commander and the submarine would be exposed in attempting to visit and search an armed enemy ship in disguise, and the necessity of making the German measures effective at all events, make visit and search impossible, except when neutral vessels are recognizable as such. In order to avoid the possibility of mistaking American for hostile merchant vessels, Germany suggested that the United States convoy their ships carrying peaceable cargoes while traversing the war zone, or that such ships be made recognizable by special markings.

The United States did not accept Germany's suggestion of convoy and refused to entertain the offer to designate certain vessels which shall be free to travel in the war zone. Such an agreement, the United States asserted, would, by implication, subject other vessels to illegal attack, and would be an abandonment of the principles for which our government contends. In opposition to the reasons given by Germany for the non-observance of the rules of war with reference to visit and search, the United States sets up the indisputable rights of Americans to take their ships into all parts of the high seas and to pursue their lawful errands as passengers on merchant ships of belligerent nationality. It recognizes the extraordinary conditions created by the war and the radical alterations of circumstance and method of attack produced by the use of instrumentalities of naval warfare which the nations did not have in view when the existing rules of international law were formulated, and it is ready to make every reasonable allowance for these

novel and unexpected aspects of war at sea; but it cannot consent to abate any essential or fundamental right of its people because of a mere alteration of circumstance. It insists that the lives of noncombatants, whether they be of neutral citizenship or citizens of one of the nations at war, cannot lawfully or rightfully be put in jeopardy by the capture or destruction of an unarmed merchantman, and that the commanders of submarines may do nothing that would involve the lives of noncombatants or the safety of neutral ships, even at the cost of failing of their object of capture or destruction. It is manifestly impossible, contends the United States, to use submarines against merchantmen without an inevitable violation of many sacred principles of justice and humanity, for it is practically impossible for the officers of a submarine to visit a merchantman at sea and examine her papers and cargo; it is practically impossible for them to make a prize of her; if they cannot put a prize crew on board of her, they cannot sink her without leaving all her crew and all on board of her to the mercy of the sea in small boats, and in some cases time enough for even that poor measure of safety is not given. The United States firmly maintains that the rights of neutrals in time of war are based, not upon expediency, but upon immutable principles; that it is the duty and obligation of belligerents to find a way to adapt the new circumstances to them, and that if a belligerent cannot retaliate against an enemy without injuring the lives and property of neutrals, humanity, justice and a due regard for the sovereignty and dignity of neutral powers should dictate that the practice be discontinued.

In the course of the discussion, Germany acknowledged her liability in the case of the torpedoing of the American steamer *Gulflight*, and offered compensation for the damages sustained by American citizens. The steamer, it was explained, was mistaken for an enemy vessel, because it was convoyed by British ships and had no distinctive marks to show that it was neutral.

Concerning the attack by airships on the American steamer *Cushing*, Germany also indicated her willingness to acknowledge liability and make reparation, but after an investigation, she was unable definitely to establish the attack in fact. A German aviator had attacked what he thought was a hostile vessel, which may possibly have been the *Cushing*, at the time and place of the attack on the latter, but the vessel in question carried no flag and displayed no neutral markings. The United States was asked to submit the evidence in its possession.

With reference to the attack on the British steamer *Falaba*, Germany stated that it was the intention of the commander of the submarine to allow the passengers and crew ample time to save themselves, but the captain of the *Falaba* disregarded the order to lay to and took flight, sending up rocket signals for help, whereupon the German commander ordered the passengers and crew to leave the ship within ten minutes. Twenty-three minutes were actually allowed before the torpedo was fired, and then only upon the approach of suspicious steamers. The United States declined to accept this explanation as in any way relieving Germany of responsibility for the loss of American lives. It took the ground that an effort on the part of a merchantman to escape capture and secure assistance does not alter the obligation of the capturing vessel in respect of the safety of the lives on board after the vessel had ceased her attempt to escape. "Nothing but actual forcible resistance or continued efforts to escape by flight when ordered to stop for the purpose of visit on the part of the merchantman has ever been held to forfeit the lives of her passengers or crew."

In explanation of the attack upon the *Lusitania*, Germany alleged that the vessel was equipped with masked guns, supplied with trained gunners and special ammunition, transported Canadian troops, carried a cargo of explosives prohibited by the laws of the United States to passenger vessels, and was serving virtually as an auxiliary to the British naval forces. It was also alleged that the vessel had a large cargo of ammunition destined for Great Britain, in the destruction of which Germany acted in self-defense; that if the commander of the submarine had allowed the passengers and crew time to put out in boats before firing the torpedo, his own vessel would surely have been destroyed; that it might reasonably have been expected that such a mighty ship would have remained above water long enough after being torpedoed to permit the passengers to enter the ship's boats; and that the rapid sinking of the vessel was primarily due to the explosion of the cargo of ammunition caused by the torpedo. The United States made a flat denial, based upon official information, that the *Lusitania* was armed for offensive action; that she was serving as a transport; that she carried a cargo prohibited by the statutes of the United States and that she was a naval vessel of Great Britain. The contentions of Germany regarding the carriage of contraband and its explosion by the torpedo the United States regarded as irrelevant to the question of the legality of the methods used by the German naval authorities in sinking the

vessel, and it reiterated its stand taken in the *Falaba* case that only the actual resistance of the vessel to capture or refusal to stop when ordered to do so for the purpose of visit could have offered the commander of the submarine any justification for so much as putting the lives of those on board in jeopardy. "Whatever be the other facts regarding the *Lusitania*," concluded the American note on this point, "the principal fact is that a great steamer, primarily and chiefly a conveyance for passengers, and carrying more than a thousand souls who had no part or lot in the conduct of the war, was torpedoed and sunk without so much as a challenge or a warning, and that men, women and children were sent to their death in circumstances unparalleled in modern warfare." The United States demanded a disavowal of the act of the German naval commander in sinking the *Lusitania*, reparation for the American lives lost, and warned Germany that a repetition of acts of her naval authorities in contravention of the neutral rights of American citizens would be regarded as "deliberately unfriendly."

A mighty belligerent has thus been brought, so to speak, before the bar of humanity and civilization to answer a no less powerful neutral for alleged infractions of the laws governing their relations in the society of nations, of which they both are members. The magnitude of the material interests entrusted to the care of each government and the great influence which each exerts upon the practice and customs of international relationships make the outcome of the controversy of much importance to both, and neither can afford to give up any rights which they legitimately possess nor suffer any infringement or diminution thereof at the hands of the other.

Germany does not deny the facts nor dispute the principles of law invoked by the United States, but sets up other facts and reasons to justify her course of action. Her replies amount virtually to a plea of confession and avoidance and the burden of proof therefore rests upon her. An examination of her answer will show whether or not she has made out her case.

Germany pleads, in the first place, the necessity for retaliation against her enemies, but in carrying out her measures she draws no distinction between enemy and friend and inflicts the most extreme penalty upon both alike. According to accepted doctrines retaliation may be justified in war only against an enemy for failing to observe the rules of war and humanity. It finds no place in the body of rules regulating the relations of neutrals and belligerents. But in order to establish some

basis for including neutrals within the punishment meted out to her enemies, Germany practically alleges that her acts of retaliation are designedly directed against neutrals because they have failed to force Great Britain to allow them to trade with Germany. Prohibitions of commercial intercourse may justify acts of retaliation in kind, but the claim of the right of a belligerent to retaliate against a neutral for acts of the enemy in interfering with commerce between their respective countries is one which the United States has shown itself in historic times to be unwilling to accept at any cost. It is the duty, not of the neutral, but primarily of the belligerent who depends so much upon foreign commerce, to protect that commerce from the interference of his enemy and if he is unable to protect himself in this way, he must take the consequences of his own weakness. He cannot be heard to say that his weakness is an excuse for attacks upon a neutral. The neutral alone determines the measures he will take to protect his legitimate trade. As long as he acts impartially between the belligerents they have no cause whatever for complaint, and in determining the neutral's impartiality the relative military and naval strength of the respective belligerents is not a matter which can be taken into consideration.

The interruption of trade between Germany and the United States cannot be attributed to any act of the United States, but is caused exclusively by the acts of Germany's enemies. Protests have been lodged with Great Britain on every occasion when the United States considered that its rights as a neutral trader required such a protest. If the diplomatic correspondence with Great Britain has been conducted in less vigorous terms than that with Germany, it is because of the difference in the methods employed by the two belligerents in asserting their alleged belligerent rights. On the one hand, not a single American ship or cargo has been destroyed, not a single American life endangered or taken, and for the cargoes detained compensation in many cases has already been paid; while, on the other hand, attempts have been made to destroy American vessels with their cargoes, and in one case at least the attempt was successful, and hundreds of American lives have been ruthlessly jeopardized and in some instances sacrificed. In the absence of any acts on the part of the United States or its citizens, illegal according to the accepted principles of international law, Germany has no basis whatever for taking any action against them, illegal according to the same principles, and her justification of such illegal acts on the ground of retaliation is therefore untenable.

Passing from Germany's allegation that her acts beyond the law are justified as measures of retaliation, an examination will now be made of her explanation of those acts on grounds coming within the law.

The first contention of this kind is that the attacks of submarines are justified as a means of stopping the supply of war material to Germany's enemies. A belligerent has always exercised the right of preventing contraband trade with the enemy, and while neutrals have an undoubted right to engage in such trade, they cannot object if a belligerent seizes and confiscates it before it reaches its enemy destination. But aside from the question of the regulation of the manner of seizure and condemnation, the penalty which may be inflicted upon a neutral for engaging in the carriage of contraband must not exceed his offence against the belligerent. The right to confiscate a contraband cargo has never been and is not now disputed; the law books and decisions of prize courts teem with discussions as to the circumstances under which a ship and innocent cargo may be confiscated; and both ship and cargo may, in exceptional cases, be destroyed; but the authorities and precedents will be searched in vain for any justification or excuse for taking the lives of the persons on board a ship carrying contraband cargo. No personal penalty has ever attached to neutrals for carrying contraband, except the risk of the loss of ship and cargo, nor has any inconvenience been suffered by neutral passengers on contraband-carrying ships, except the possible breaking up of their voyage. The infliction by Germany in the present war of the extreme penalty of death is therefore as unjustifiable on this ground as it is upon the ground of retaliation.

The statement that Germany is relieved of responsibility because of the warning issued before the acts were committed hardly deserves mention in the discussion of questions as serious as those under consideration. A threat to do an illegal act is, according to municipal law, a separate crime in itself, and although Germany's threat may not be a crime under international law, her warning that an illegal act under international law is to be committed cannot justify her commission of the act: it rather aggravates the offence by showing premeditation and design.

Recognizing the weakness of her position on the grounds previously discussed, Germany makes specific reply to the objections raised by the United States to attacks by submarines upon merchant vessels without first ascertaining their nationality or the contraband character of their

cargo, to their confiscation by destruction without condemnation through the usual prize court proceedings, and to the failure of the submarine to provide for the safety of the passengers and crew.

Germany's defense of the peremptory destruction of British vessels amounts to a denial that they have the status of merchant vessels. According to the German contention, the arming of merchant vessels for defensive purposes and the instructions to them to resist the attacks of German submarines take these vessels out of the category of merchant ships and convert them into war ships, which can be surprised and destroyed without warning, including their cargoes and all on board. This view is apparently an erroneous construction of the abolition of privateering by the Declaration of Paris to mean that merchant ships cannot be armed for offensive purposes and cannot defend themselves if attacked.[1] But this doctrine is directly opposed to the Anglo-American practice, which recognizes the right of an enemy merchantman to defend itself against attack, and to escape if it can, but not to engage in aggressive warfare.[2] The American doctrine was stated by Chief Justice Marshall in delivering the opinion of the Supreme Court of the United States in the case of the *Nereide*,[3] decided on March 6, 1815. His decision was reaffirmed three years later by the same court in the case of the *Atalanta*.[4] In the decision first mentioned the Chief Justice held squarely that "a belligerent has a perfect right to arm in his defense" and that "a neutral has a perfect right to transport his goods in a belligerent ship." Discussing the relation of these rights to the rights of the enemy, the Chief Justice said:

> The neutral has no control over the belligerent right to arm—ought he to be accountable for the exercise of it? By placing neutral property in a belligerent ship, that property, according to the positive rules of law, does not cease to be neutral.

[1] The German views will be found clearly stated in the work of Dr. Schramm, special adviser to the German Admiralty, entitled "Das Prisenrecht," pp. 266–267, and the question is carefully considered by Dr. Heinrich Triepel, professor at the University of Berlin, in an article entitled "Der Wiederstand feindlicher Handelsschiffe gegen die Aufbrigung" in the *Zeitschrift für Völkerrecht*, No. 8, p. 378.

[2] For an exposition of the British policy of arming merchant vessels and an historical review of the practice, see the article in this JOURNAL for October, 1914, p. 705, by Mr. A. Pearce Higgins, lecturer of international law at the London School of Economic and Political Science, formerly deputy Whewell professor of international law in the University of Cambridge.

[3] 9 Cranch, 389.

[4] 3 Wheaton, 409.

Why should it be changed by the exercise of a belligerent right, universally acknowledged, and in common use when the rule was laid down, and over which the neutral had no control?

The belligerent answers, that by arming, his rights are impaired. By placing his goods under the guns of an enemy, the neutral has taken part with the enemy, and assumed the hostile character. Previous to that examination which the court has been able to make of the reasoning by which this proposition is sustained, one remark will be made, which applies to a great part of it. The argument which, taken in its fair sense, would prove that it is unlawful to deposit goods for transportation in the vessel of an enemy, generally, however imposing its form, must be unsound, because it is in contradiction to acknowledged law.

The Chief Justice then went further and held that the resistance of the enemy vessel to capture did not infect, as it were, the property of the neutral carrier, and that the property of the neutral would not share the fate of the enemy vessel unless the owner took part in the resistance to capture. Referring to the character of such a vessel and the risk assumed by neutrals in employing it as a means of transportation, the Chief Justice remarked:

She is an open and declared belligerent; claiming all the rights, and subject to all the dangers, of the belligerent character. She conveys neutral property, which does not engage in her warlike equipments, nor in any employment she may make of them; which is put on board solely for the purpose of transportation, and which encounters the hazard incident to its situation; *the hazard of being taken into port, and obliged to seek other conveyance, should its carrier be captured.*

The status of passengers was not and could not have been involved in this case, for that question has been raised for the first time by Germany in the present war. Their personal security was so firmly established in the practice of nations that the Chief Justice took occasion to reinforce his conclusion as to the goods on board by drawing an analogy between the status of neutral passengers and the position of neutral goods. He used the following language:

If the neutral character of the goods is forfeited by the resistance of the belligerent vessel, *why is not the neutral character of the passengers forfeited by the same cause?* The master and crew are prisoners of war, why are not those passengers who did not engage in the conflict, also prisoners? That they are not, would seem to the court to afford a strong argument in favor of the goods. The law would operate in the same manner on both.

This case is more significant because the neutral owner of the goods was actually on board the armed merchant vessel at the time of seizure and during its resistance to capture.

The holding that merchant vessels may be armed for defensive purposes was actually applied in the practice of the United States during the present war before the submarine issue was raised. A circular issued by the Department of State on September 19, 1914, with reference to the status of armed merchant vessels,[5] declares that "a merchant vessel of belligerent nationality may carry an armament and ammunition for the sole purpose of defense without acquiring the character of a ship of war," and the character of a defensive armament is defined in detail.

The opinion of Chief Justice Marshall on these points represents the mature conclusions of a great jurist applying, after careful examination and thorough consideration, the principles of the law of nations, which the United States, with commendable firmness declares are immutable and cannot be modified by a single nation for reasons of expediency.

Assuming that proper steps are taken for the safety of the passengers and crew and the security of the neutral cargo on board an enemy vessel, no doubt can be raised as to the right of the German submarines to destroy the vessel itself. In the case of enemy vessels, capture, that is to say, seizure with intent to retain, passes title immediately to the captor's government. The intervention of a prize court is necessary only in order to pass the title from the capturing government to an individual claimant, if there be a municipal statute giving the individual captors an interest in the vessel or property. This is, however, a matter of indifference to the proprietors of the enemy ship. As soon as it is seized they lose their title and, barring recapture, the vessel is lost to them, and it is all one to the erstwhile owner whether the ship be sunk or whether it be taken into an enemy port.[6]

The destruction of neutral vessels or of neutral property on board an enemy vessel is, however, a very different matter. The neutral does not lose title to his vessel or cargo until it has been legally condemned according to the regular course of proceedings in a prize court for reasons recognized by international law as just grounds for condemnation. Such proceedings should not be held upon the quarter deck of a warship nor after the vessel with its papers has been destroyed. While danger to the capturing vessel or to the success of its operations, distance from the home port, or other circumstances, may justify the destruction of an enemy vessel, it has been held by the prize courts that such reasons cannot justify the destruction of a neutral vessel, or of enemy vessels when

[5] Supplement to this JOURNAL for January, 1915, p. 121.

[6] Hall, International Law, 4th Edition, pp. 474–5, 477.

there is neutral cargo on board, and if there is any doubt as to the captor's power to bring such a vessel to adjudication, it is his duty to release her.[7] Lord Stowell, in a case decided in 1819[8] went so far as to declare that the destruction of neutral property without bringing it in for adjudication "cannot be justified to the neutral owner by the gravest importance of such an act to the public service of the captor's own state. To the neutral it can only be justified, under any such circumstances, by a full restitution in value." Where neutral lives, instead of neutral property, are destroyed, restitution in full value is impossible.

In the course of the discussion relating to neutral vessels, Germany has modified her original warning that, in order to avoid mistakes, such ships keep entirely away from the war zone, by suggesting that such vessels when navigating the war zone be convoyed or be made recognizable as neutral by special markings. The reasons given for requiring neutrals to take these precautions is that British ships are sailing under neutral flags, and that neutral ships sailing under their own flags may be mistaken for enemy ships. Here again Germany seeks to impose upon neutrals an entirely new and illegal burden. The disguising of the ships of belligerents is a longstanding practice of naval warfare, and is expressly recognized in the German Prize Code. It is a matter over which neutrals have no control and they have never been punished for its exercise. Indeed, one of the chief reasons for recognizing the right of visit and search of vessels flying neutral flags is precisely to determine if they are entitled to fly the neutral flag. The onus of proof of belligerent nationality has always rested upon the captor, but Germany now seeks to relieve herself of this duty and to impose it upon neutrals by forcing them, under penalty of destruction and death, to establish their neutral character by external signs. The United States was, therefore, fully justified in ignoring such suggestions. Further ample and sufficient reasons for disregarding them will also appear upon slight reflection. To acknowledge Germany's right to sink on sight vessels not distinctively marked as neutral would, by implication, be an acquiescence in her claim to sink on sight other neutral vessels not so marked and enemy vessels which may have neutral persons and cargoes on board. The convoying of American vessels bound for enemy ports would in addition give Germany an opportunity to insist that American vessels

[7] The *Leucade*, 2 Spinks, 228, 231.

[8] The *Felicity*, 2 Dod. 381.

bound for German or neutral ports be also convoyed and thus embroil the United States in the disputes between Germany and her enemies on the question of imports into Germany.

A further excuse for the acts of her submarines is given in Germany's allegation that it would endanger the safety of the German officers and submarines to attempt to visit and search British vessels, and even neutral vessels for fear of encountering a British vessel in disguise. This unfortunate embarrassment does not exist through any fault of the neutrals who may happen to be on board a British vessel or who are lawfully navigating their own vessels. It arises solely by reason of the difficulty of adapting such an instrument of warfare as the submarine to the universally recognized rules applicable to the capture of merchant vessels. The logic of such a situation would seem to require, not that neutrals be punished for Germany's inability to comply with the rules, but that she accede to the demand of the United States and either devise means of adapting her practice to the rules or discontinue it. This acknowledgment by Germany of her inability to apply the rules of naval warfare is a conclusive verification of the statement contained in the American note of May 13th that "manifestly submarines cannot be used against merchantmen without an inevitable violation of many sacred principles of justice and humanity."

From this review of the questions at issue between Germany and the United States and the examination of the principles involved, the conclusion is unavoidable that the warfare against merchant vessels as at present conducted by Germany is, in the words of Mr. Bryan while Secretary of State, "in clear violation of universally acknowledged international obligations" and constitutes, in the language of Secretary of State Lansing, "grave and unjustifiable violations of the rights of American citizens." No matter how necessary such acts may be to the success of Germany's naval and military operations, they are, again to quote Secretary Lansing, "manifestly indefensible when they deprive neutrals of their acknowledged rights." These rights the United States enjoys not only under the general principles of international law, codified in some cases by international conventions adopted at The Hague to which both Germany and the United States are firmly bound, but the United States is specially entitled to them against Germany by virtue of the provisions of the treaty of 1828 between the United States and Prussia, which expressly stipulates that "if one of the contracting parties should be engaged in war with any other power, the free intercourse and

commerce of the subjects or citizens of the party remaining neuter with the belligerent powers shall not be interrupted."

THE QUESTIONS IN DISPUTE BETWEEN THE UNITED STATES AND GREAT BRITAIN WITH REFERENCE TO INTERFERENCE WITH NEUTRAL TRADE

The government of Great Britain on March 1, 1915, notified the Department of State at Washington that the German proclamation of a war zone and its enforcement by submarines through indiscriminate destruction, instead of by regulated capture, with the object of preventing commodities of all kinds, including food for the civil population, from reaching or leaving the British Isles or northern France had forced Great Britain and France to take retaliatory measures to prevent commodities of any kind from reaching or leaving Germany, by detaining and taking into port ships carrying goods of presumed enemy destination, ownership or origin. These measures would be enforced without risk to neutral ships or to neutral noncombatant lives and in strict observance of the dictates of humanity. The vessels and cargo would not be confiscated unless they were otherwise liable to condemnation.

The United States promptly, on March 5, 1915, interrogated the British and French Governments as to the meaning of this declaration. It pointed out that the right to prevent commodities of any kind from reaching or leaving Germany appertained to a state of blockade which, in this case, had not been declared, while the announcement that the vessels and cargoes would not be confiscated for attempting to enter or leave Germany indicated a treatment as if no blockade existed. In this paradoxical situation the United States declared that neutrals had no standard by which to measure their rights and insisted that the declaring powers assert whether they rely upon the rules covering blockade or the rules applicable when no blockade exists. It also pointed out that the announcement that vessels or cargoes detained for attempting to enter Germany would not be confiscated unless otherwise liable to condemnation indicated that the rules of contraband were to be applied to the cargoes detained. Attention was called to the fact, however, that the rule covering noncontraband articles carried in neutral bottoms, requires that the cargoes be released and the ships allowed to proceed. According to the announcement, however, the ships were not to be allowed to proceed to their destination, and the United States inquired what was to be done with innocent and conditional contraband cargoes?

As to cargoes coming out of Germany, the United States said that, under the rules governing enemy exports, only goods owned by enemy subjects in enemy bottoms are subject to seizure and condemnation, while by the declaration it is proposed to seize and take into port all goods of enemy "ownership or origin." The United States maintained that the origin of goods destined to neutral territory on neutral ships is not and never has been a ground for forfeiture, except in case a blockade is proclaimed and maintained, and it was queried upon what principle of law the cargo or a neutral ship, sailing out of a German port, could be condemned? And if it was not condemned, what other legal course was open except to release it? In case the belligerents construed their declaration as an announcement of a blockade, the United States insisted that there should be some limit to the radius of activity of the blockading vessels so that neutral vessels would not be liable to seizure far from the scene of the blockade.

Great Britain replied, on March 15th, that, succinctly stated, the object of the declaration is to establish a blockade to prevent vessels from carrying goods for or coming from Germany, but that in initiating a policy of blockade, the British Government felt reluctant to exact from neutral ships all the penalties attaching to a breach of blockade. In order to alleviate the burden which maritime war inevitably imposes on neutral seaborne commerce, Great Britain would refrain altogether from the exercise of the right to confiscate ships or cargoes which it had in respect of breaches of blockade, and would limit themselves to stopping the cargoes destined to or coming from the enemy's territory. Concerning the radius of activity Great Britain stated that it was not intended to interfere with neutral vessels carrying an enemy cargo of a noncontraband nature outside European waters, including the Mediterranean.

Accompanying the British note was an order in council published on the same date indicating the manner in which the proposed measures would be carried out. The order applies to all vessels sailing after March 1, 1915, not only to and from German ports, but to and from neutral ports.

All merchant vessels bound for German ports are required to discharge their cargoes in a British or allied port where, subject to the right of requisition by the crown, noncontraband goods will be restored to the persons entitled thereto under the direction of the prize court.

All merchant vessels which sail from German ports are required to discharge goods laden at such ports, in a British or allied port where, sub-

ject to the right of requisition by the crown, they will be sold under the direction of the prize court and the proceeds dealt with in such manner as the court may deem to be just. Neutral property laden at German ports and discharged in British or allied ports, may be released on the application of the crown, and the proceeds of the sale of goods laden in Germany which had become neutral property before the date of the order in council, may be paid to the persons entitled thereto, but the proceeds of the sale of all other goods laden in Germany may not be paid out of court until the conclusion of peace.

All merchant vessels bound for neutral ports carrying enemy property or goods with an enemy destination are required to discharge such goods and property in a British or allied port where, subject to the right of requisition by the crown, noncontraband goods will be restored to the persons entitled thereto upon such terms as the prize court may consider just. This provision does not apply to vessels carrying goods laden at German ports.

All merchant vessels which sail from neutral ports with enemy property or goods of enemy origin may be required to discharge such goods in a British or allied port where, subject to the right of requisition by the crown, they will be sold and the proceeds dealt with in the discretion of the court. Neutral property of enemy origin may be released on application of the crown but no proceeds of sale may be paid out of court until the conclusion of peace, except upon application of the crown or proof that the goods had become neutral property before the issuance of the order in council.

This order, the covering note explained, afforded a wide discretion to the prize court in dealing with the trade of neutrals in such manner as may in the circumstances be deemed just, and particular attention was directed to the following provision inserted in the order to facilitate claims by persons interested in any goods placed in the custody of the prize court under the order:

> Any person claiming to be interested in, or to have any claim in respect of, any goods (not being contraband of war), placed in the custody of the marshal of the prize court under this order, or in the proceeds of such goods, may forthwith issue a writ in the prize court against the proper officer of the Crown and apply for an order that the goods should be restored to him, or that their proceeds should be paid to him, or for such other order as the circumstances of the case may require.

Great Britain gave assurances that the instructions which would be issued to the fleet, executive officers and committees upon whom the

order conferred powers, would impress upon them the duty of acting with the utmost despatch and of showing in every case such consideration for neutrals as may be compatible with the object of establishing the blockade.

After an examination of this order in council the United States on March 30, 1915 informed Great Britain that, were its provisions to be actually carried into effect, it would constitute "a practical assertion of unlimited belligerent rights over neutral commerce within the whole European area, and an almost unqualified denial of the sovereign rights of the nations now at peace." It was asserted by the United States that "a nation's sovereignty over its own ships and citizens under its own flag on the high seas in time of peace is unlimited; and that sovereignty suffers no diminution in time of war, except in so far as the practice and consent of civilized nations has limited it by the recognition of certain now clearly determined rights, which it is conceded may be exercised by nations which are at war." These rights were enumerated as the right of visit and search and the right of capture and condemnation if, upon examination, a neutral vessel is found to be engaged in unneutral service or to be carrying contraband of war intended for an enemy's government or armed forces; the right to establish and maintain a blockade of the enemy's ports and coasts and to capture and condemn any vessel taken in trying to break the blockade; the right to detain and take into port for judicial examination all vessels which may be suspected for substantial reasons to be engaged in unneutral or contraband service, and to condemn them if the suspicion is sustained. "But such rights," continued the American note, "long clearly defined both in doctrine and practice, have hitherto been held to be the only permissible exceptions to the principle of universal equality of sovereignty on the high seas as between belligerents and nations not engaged in war."

Taking up the provisions of the order in council, the United States, assuming that a blockade exists and the doctrine of contraband as to unblockaded territory is rigidly enforced, entered a protest against Great Britain's claim of the right to detain, requisition or confiscate innocent shipments which may be transported from the United States through neutral countries to belligerent territory and enemy goods which may be transported from neutral countries to the United States in neutral ships.

Recurring to Great Britain's notification that her measures constituted a blockade, the United States pointed out that the order in

council included not only the coasts and ports of Germany, but "embraces many neutral ports and coasts, bars access to them, and subjects all neutral ships seeking to approach them to the same suspicion that would attach to them were they bound for the ports of the enemies of Great Britain, and to unusual risks and penalties." Such limitations, risks and liabilities the United States contended "are a distinct invasion of the sovereign rights of the nation whose ships, trade, or commerce is interfered with."

Admitting that the changes which have occurred in the condition and means of naval warfare might make it impracticable to maintain the old form of "close" blockade with its cordon of ships in the immediate offing of the blockaded ports, the United States, however, maintained that:

> If the necessities of the case should seem to render it imperative that the cordon of blockading vessels be extended across the approaches to any neighboring neutral port or country, it would seem clear that it would still be easily practicable to comply with the well-recognized and reasonable prohibition of international law against the blockading of neutral ports by according free admission and exit to all lawful traffic with neutral ports through the blockading cordon. This traffic would of course include all outward-bound traffic from the neutral country and all inward-bound traffic to the neutral country except contraband in transit to the enemy. Such procedure need not conflict in any respect with the rights of the belligerent maintaining the blockade since the right would remain with the blockading vessels to visit and search all ships either entering or leaving the neutral territory which they were in fact, but not of right, investing.

The British notes and the order in council announced that the interdiction of commercial intercourse with Germany was decreed as a measure of retaliation against Germany's war zone decree and activities in pursuance thereof, but the United States answered in the same terms in which it answered Germany on the same point, namely, that the allegation by Great Britain of illegal acts on the part of her enemy could not be cited as in any sense or degree a justification for similar practices on her part as they affect neutral rights.

The United States called attention to the great area of the high seas included in the so-called blockade and the distance from the territory affected to the cordon of blockading ships, and insisted that American vessels passing through this area on the way to neutral ports which Great Britain has not the legal right to blockade, be not interfered with; and, finally, the United States indicated its purpose to demand of Great

Britain full reparation for every act which, under the rules of international law, constitutes a violation of neutral rights.

Great Britain's reply of July 24, 1915, alleged that the right of a belligerent to blockade the enemy's ports has no value save in so far as it gives power to a belligerent to cut off the sea-borne exports and imports of his enemy, and that the contention put forward by the United States that if a belligerent is so circumstanced that his commerce can pass through adjacent neutral ports as easily as through ports in his own territory, his opponent has no right to interfere and must restrict his measures of blockade in such a manner as to leave such avenues of commerce still open to his adversary, is unsustainable either in point of law or upon principles of international equity. Continuing along this line, Sir Edward Grey said:

> As a counterpoise to the freedom with which one belligerent may send his commerce across a neutral country without compromising its neutrality, the other belligerent may fairly claim to intercept such commerce before it has reached, or after it has left, the neutral state, provided, of course, that he can establish that the commerce with which he interferes is the commerce of his enemy and not commerce which is bona fide destined for or proceeding from the neutral state.

Anticipating the difficulty of citing authority in support of this alteration in acknowledged principles, it was contended that "what is really important in the general interest is that adaptations of the old rules should not be made unless they are consistent with the general principles upon which an admitted belligerent right is based," and that "if it be recognized that a blockade is in certain cases the appropriate method of intercepting the trade of an enemy country, and if the blockade can only become effective by extending it to enemy commerce passing through neutral ports, such an extension is defensible and in accordance with principles which have met with general acceptance." In this connection Great Britain cites the position of the United States in the Civil War when it was vital to the cause of the United States that it should cut off the trade of the Southern States. Neighboring neutral territory afforded convenient centers from which contraband could be introduced to supply the Confederate armies and from which blockade running could be facilitated. To meet this difficulty Great Britain alleges that "the old principles relating to contraband and blockade were developed and the doctrine of continuous voyage was applied and enforced under which goods destined for the enemy territory were intercepted before they reached the neutral ports from which they were to be reëxported." Although

British subjects were the principal sufferers from this action, the British Government, says Sir Edward Grey, took a broad view and looked below the surface at the underlying principles, and abstained from all protest against the decisions by which the ships and their cargoes were condemned. An analogy is drawn in the following language between the situation of the United States in the Civil War and the situation of the Allies in the present war:

> The difficulties which imposed upon the United States the necessity of reshaping some of the old rules are somewhat akin to those with which the Allies are now faced in dealing with the trade of their enemy. Adjacent to Germany are various neutral countries which afford her convenient opportunities for carrying on her trade with foreign countries. Her own territories are covered by a network of railways and waterways, which enable her commerce to pass as conveniently through ports in such neutral countries as through her own. A blockade limited to enemy ports would leave open routes by which every kind of German commerce could pass almost as easily as through the ports in her own territory. Rotterdam is indeed the nearest outlet for some of the industrial districts of Germany.

In another passage Sir Edward Grey, speaking of the adaptation of existing principles to altered circumstances, referred to the need of avoiding all unnecessary injury to neutrals and stated that Great Britain has tempered the severity with which her measures might press upon neutrals "by not applying the rule which was invariable in the old form of blockade that ships and goods on their way to or from the blockaded area are liable to condemnation."

In answer to the American protest against the blockade of neutral ports, Great Britain denies that her measures can be properly so described. "If we are successful," she says, "in the efforts we are making to distinguish between the commerce of neutral and enemy countries, there will be no substantial interference with the trade of neutral ports except in so far as they constitute ports of access to and exit from the enemy territory."

As to the provision of the order in council concerning the detention of enemy goods in neutral vessels, against which the United States also protested, Great Britain explains that in actual practice she is not detaining goods on the sole ground that they are the property of the enemy, but detains only in such cases where proof of enemy property affords strong evidence that it is of enemy origin or destination, the purpose being to intercept commerce on its way from or to an enemy country.

The reply of the United States to this note has not been made at the

time the Journal goes to press, and comment upon the contentions of the British Government will therefore be withheld for a future number.

THE SALE OF ARMS AND AMMUNITION BY AMERICAN MERCHANTS TO BELLIGERENTS

In view of the exchange of notes on this question between Germany and the United States and Austria-Hungary and the United States it is advisable to examine it with some care and in some detail.

At the very outset we are met by a distinction between the acts of governments and of individuals, a distinction of the greatest importance, which must be borne in mind if confusion is to be avoided. This distinction was carefully noted in the Hague convention respecting the rights and duties of neutral Powers and persons in case of war on land of October 18, 1907, which convention was signed by Germany on that date and ratifications thereof deposited by Germany at The Hague November 27, 1909. The United States likewise had signed and deposited ratifications on the same date as Germany. This convention may or may not be in force. It is quoted here as indicating the views of Germany in 1907 when it signed it, and in 1909 when it ratified it, as to the duties and rights of belligerent and neutral Powers. Article 2 of this important convention reads:

> Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power.

Article 4 reads:

> Corps of combatants can not be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents.

Article 6 reads:

> The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents.

Article 7 reads:

> A neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet.

This convention was signed by thirty-four countries. It has been ratified by twenty-five and has been adhered to by three non-signatory

Powers (indicating a respectable *consensus gentium*, so frequently referred to in the books), and no nation reserved, either on signing, ratifying, or adhering to, the articles above mentioned.

The articles, however, contain nothing new. They are declaratory, not amendatory, of the law of nations. Their provisions would exist and be binding upon the nations whether or not they had been codified at the Second Hague Conference, and the provisions of these articles are binding, whether or not the Convention itself, by reason of Article 20, be ineffective. Article 20 provides that this convention does not apply "except between contracting Powers, and then only if all the belligerents are parties to the Convention." The convention has been quoted merely to show that the provisions above quoted were thought to be acceptable in practice by the nations generally in 1907, when they were all at peace and could express their matured views without the excitement and passion which accompanies war.

But that is not all. Article 7 above quoted, dealing with the shipment of arms, reappears as Article 7 of the convention concerning the rights and duties of neutral Powers in naval war, signed at The Hague October 18, 1907. This convention was ratified, and ratifications deposited by Germany at The Hague November 27, 1909, and was adhered to by the United States on December 3, 1909. This convention contains in Article 28 thereof a provision that it only applies to contracting Powers, "and then only if all the belligerents are parties to the convention." For reasons previously stated, it is immaterial whether this convention binds the belligerents or not. It is especially immaterial to the present discussion, because the United States is not a belligerent, and the mere fact that Germany is a belligerent neither enlarges nor lessens the rights and duties of the United States under international law, unless there be special treaties between the two countries concluded in time of peace, varying their obligations under international law. The treaty of May 1, 1828 between Prussia and the United States, and which Germany regards as binding the German Empire, as will appear from the Frye case commented on in our last issue, deals with the subject of contraband when one or the other nation is at war, and will be discussed after some observations of a general nature.

A nation cannot preserve its neutrality and yet take part in the war; nor can it perform its neutral duties if, without taking a direct part in the war, it nevertheless aids by its acts one or the other party. It must be neutral in the sense that it aids neither and allows neither to

make a hostile use of its territory. An act would be none the less unneutral if the so-called neutral government did it to both of the belligerents or allowed both of the belligerents to commit it against the neutral. Thus, a neutral nation could not properly sell arms and ammunition to a belligerent. It would simply commit a two-fold violation of neutrality if it sold arms and ammunition to each of two belligerents. It could not loan money to one or the other or both of the belligerents; it could not allow its ports to be the bases of naval operations to one or both. Neutrality does not mean indifference. It means that the nation claiming to be neutral shall not aid one or the other and shall not allow either or both of two belligerents to use it or its territory for a hostile purpose. It must abstain from the war. This is the meaning of Articles 2 and 4, previously quoted, of the convention respecting the rights and duties of neutral Powers and persons in case of war on land.

Article 5 thereof, not previously quoted, stated expressly that "a neutral Power must not allow any of the acts referred to in Articles 2 to 4 to occur on its territory." These articles, however, refer specifically to acts of belligerents as such, a fact pointed out by the reporter in his official interpretation of the convention, who said, in speaking of Article 2:

> The prohibition created by Article 2 is addressed to the belligerents; it is not in contradiction with Article 7, which only concerns commercial operations undertaken by private individuals.

Let us now consider Article 7, which had the good fortune of being approved on two occasions by the Second Hague Conference, and which is incorporated in two formal conventions of that illustrious assembly.

It is the custom in international conferences to accompany the texts of conventions with a report which is a statement of the origin and meaning of the text, and the convention adopted by the conference is understood and interpreted in the sense in which the convention is explained in the report accompanying it. The report is carefully read by the delegates and, upon motion, changes are sometimes made in its text in open session, in order to ensure entire accuracy. This fact alone would justify the quotation of the reporter commenting on Article 7. There is, however, another reason which suggests that this be done. Article 7 of each of the two conventions was adopted in times of profound peace. The reporter of the first convention in which this article is found (No. V), Colonel Borel, is an enlightened publicist. The reporter of the second conven-

tion (No. XIII) was Professor Renault, without question the most eminent authority on international law then or now living. There is still another reason. The statement is non-controversial, in that it does not seek to justify the action of any one Power which has been called into question, but it is a statement of what the delegates believed was correct practice.

First as to Colonel Borel:

> The rule enunciated in this article is justified in itself, independently of the reasons of a practical kind in its favor. Theoretically, at least, neutral states and their populations are not to suffer from the consequences of a war in which they do not participate. Therefore the duties imposed on them by the war and the restrictions placed on their liberty of action should be reduced to the minimum of what is strictly necessary. There is no reason for prohibiting or interfering with the commerce of a neutral state even in regard to the articles mentioned in the text of the article above. Any obligation in this matter laid upon the neutral state would cause the greatest difficulties in actual practice, and would create inadmissible interference with commerce.
>
> Article 3 of the French project, corresponding to the Article 7 under discussion, mentions only the export, by the subjects of the neutral state, of arms, munitions of war, &c. It was on the motion of the Belgian delegation, supported by the French delegation, that the Commission adopted the more general text, embracing the transport as well as the export and making no mention of the nationality of the merchants interested, which is, indeed, quite beside the question.[1]

After commenting upon Article 6 of the convention concerning the rights and duties of neutral Powers in naval war, which forbids "the supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever," Mr. Renault proceeded to remark that:

> On the other hand, the practice has become established that a neutral state is not bound to prevent the export of arms or ammunition destined for one or other of the belligerents, whether for an army or for a fleet. There is a like provision in the draft regulations already mentioned. A neutral state may, moreover, if it prefers, forbid the export of the articles in question. It should then simply put into force a prohibition that applies equally to the two belligerents.

The German press, publicists, and apparently the Imperial German and Austro-Hungarian Governments do not question the right of the citizens or subjects of a neutral nation to furnish arms and ammunition, and, in general, supplies, to the enemy. They apparently maintain that the spirit of neutrality is violated because, as a matter of fact, Germany's

[1] *Deuxième Conférence Internationale de la Paix*, 1907, Vol. 1, p. 141.

enemies, by controlling the seas, can obtain these supplies, whereas Germany and its two allies cannot obtain these supplies because of the lack of control of the seas. It is held to be incumbent upon the United States, therefore, to forbid the sale and transportation of contraband to the Allies because, in view of the actual conditions, these supplies can only reach one, not both, of the belligerent countries.

The question really is not whether supplies reach one or the other belligerent, but whether the belligerents can purchase arms and ammunition or other contraband within the United States. American markets are open to the world. American merchants sell freely to the highest bidder. The fact that Germany and its allies cannot avail themselves, under present circumstances, of the American market, whereas the enemies of Germany can, may be the misfortune of Germany and its allies, on the one hand, and the good fortune of Germany's enemies, on the other hand. The mastery of the high seas during the present war is the affair of the belligerents, not of the United States.

The United States, in opening its markets to the world, in time of war as well as in time of peace, is pursuing a time-honored policy. It has not changed its practice to suit one or the other belligerent, and it is believed that it would be unneutral if it changed this policy during the war in order to adjust the equities of the case according to the views of neutrality contended for by the German press, German publicists, and apparently by the Imperial German and Austro-Hungarian Governments.

The United States has passed upon this question long before the present war, and under circumstances which made a strong appeal to the equities of the case. It is common knowledge that public sentiment in the United States was opposed to the Boer War, and that it would have rejoiced to see the Boer Republics maintain their independence in their gallant and unsuccessful war against Great Britain. From another point of view, the contention of the German press, of the German publicists, and apparently of the Imperial German and Austro-Hungarian Governments, was presented in a more extreme form, because the Boer Republics were wholly excluded from the seas and had neither vessels of war upon the high seas nor ports within which men-of-war could be fitted out. The question was presented to and decided by the Executive Department of the United States in 1899, at the instance of the Orange Free State. It was passed upon by the judiciary of the United States in 1901, on behalf of the South African Republic.

First, as to the Orange Free State. On December 15, 1899, Secretary of State Hay instructed Mr. Pierce as follows:

I have the honor to acknowledge the receipt of your letter of the 11th instant, in which you quote a letter received from Doctor Hendrick Muller, envoy extraordinary of the Orange Free State, dated The Hague, November 28 last, in which he calls your attention to the alleged shipment of material, contraband of war, by the English Government on a large scale from the United States, maintains that such shipment is contrary to the law of nations, and suggests your remonstrating with this government against the continuance of such irregularities.

In reply I have the honor to quote from 1 Kent's Commentaries, page 142, concerning the well-established doctrine, as to the law of nations on the subject. Chancellor Kent said:

> "It was contended on the part of the French nation in 1796, that neutral governments were bound to restrain their subjects from selling or exporting articles contraband of war, to the belligerent Powers. It was successfully shown, on the part of the United States, that neutrals may lawfully sell, at home, to a belligerent purchaser, or carry, themselves, to the belligerent Powers, contraband articles, subject to the right of seizure, *in transitu*. The right has since been explicitly declared by the judicial authorities of this country."

Mr. Justice Story, in the case of the *Santissima Trinidad* (7 Wheaton, 340), used the following language:

> "There is nothing in our laws or in the law of nations that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation."

In the case of the *Bermuda*, 3 Wallace, 514, Chief Justice Chase said:

> "Neutrals in their own country may sell to belligerents whatever belligerents choose to buy. The principal exceptions to this rule are, that neutrals must not sell to one belligerent what they refuse to sell to the other," etc.

An examination of Wharton's Digest of International Laws, section 391, will make it clear that the executive departments of this government from the earliest period have maintained the correctness of the doctrine stated by Chancellor Kent, and that, in this position, they have been supported by the decisions of the courts of the United States and by the opinions of eminent authorities on international law.

Under the circumstance, therefore, and in view of the fact that the law on the subject in the United States is well settled, the department does not consider it necessary to cause an investigation as to the correctness of the facts alleged by Doctor Muller.[2]

Next, as to the South African Republic. In 1901 one Samuel Pearson, on behalf of the Transvaal, whereof he was a citizen, asked an injunction in the Circuit Court of the United States for the Eastern District of Louisiana to restrain the exportation of mules, arms and munitions of

[2] VII Moore's Int. Law Digest, pp. 969–970.

war for the benefit of Great Britain, with which country the Transvaal was then at war. The court refused the injunction, saying "that the case is a political one, of which a court of equity can take no cognizance, and which, in the very nature of governmental things, must belong to the executive branch of the government." In the course of his opinion, however, the judge stated in clear and unmistakable terms what he conceived the law on the subject of contraband to be. Thus, Parlange, District Judge, said: [3]

The principle that neutral citizens may lawfully sell to belligerents has long since been settled in this country by the highest judicial authority. In the case of the *Santissima Trinidad*, 7 Wheat. 340, 5 L. Ed. 454, Mr. Justice Story, as the organ of the supreme court, said:

"There is nothing in our laws or in the laws of nations that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation."

See, also, the case of the *Bermuda*, 3 Wall. 551, 18 L. Ed. 200.

16 Am. and Eng. Enc. Law (2d Ed.) p. 1161, verbis "International Law," citing cases in support of the text, says:

"A neutral nation is, in general, bound not to furnish munitions of war to a belligerent, but there is no obligation upon it to prevent its subjects from doing so; and neutral subjects may freely sell at home to a belligerent purchaser, or carry to a belligerent Power, arms and munitions of war, subject only to the possibility of their seizure as contraband while in transit."

Numerous other authorities on this point could be cited, if it was not deemed entirely unnecessary to do so.

The principle has been adhered to by the executive department of the government from the time when Mr. Jefferson was Secretary of State to the present day. Mr. Jefferson said in 1793:

"Our citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings—the only means, perhaps, of their subsistence—because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal derangement in their occupation."

To the same effect are numerous other expressions and declarations of the executive department of the government from the earliest period of the country to the present time. See 3 Whart. Int. Law Dig. par. 391, tit. "Munitions of War."

Affidavits in the cause purport to show that the vessels which make the exportation of mules and horses of which the bills complain are private merchant vessels; that they are commanded by their usual officers, appointed and paid by the owners;

[3] Pearson *v.* Parson (108 Fed. Rep. 461, 163).

that they are manned by their usual private crews, which are also paid by the owners; that they are not equipped for war; that they are not in the military service of Great Britain, nor controlled by the naval authorities of that nation; that they carry the mules and horses as they would carry any other cargo; and that the mules and horses are to be landed, not on the territory of the South African Republic or the Orange Free State, but in Cape Colony, which is territory belonging to Great Britain. If these affidavits set out the facts truly, it is difficult to see how a cause of complaint can arise. If a belligerent may come to this country and buy munitions of war, it seems clear that he may export them as freight in private merchant vessels of his own or any other nationality, as cargo could be exported by the general public.

These decisions of the United States during the Boer War are peculiarly applicable to the present complaints of Germany and Austria, for the Boer Republics were in a situation almost identical in respect of the supply of arms and ammunition from overseas with that in which Austria and Germany find themselves during the present war. Yet the fact that the Boers were prevented by British naval vessels from purchasing munitions of war did not deter Germany and Austria from selling large quantities of war material to the other belligerent, who happened to be in control of the seas. Indeed, the large extent to which the manufacture of munitions of war has for years been carried on in Germany has made her one of the chief purveyors of such materials to either one or the other of the belligerents in almost every war which has occurred during the last half century or more.

There would seem, therefore, to be as little doubt as to the practice as there is to the law of nations on this subject.

THE APPOINTMENT OF MR. ROBERT LANSING AS SECRETARY OF STATE [1]

On April 1, 1914, Mr. Robert Lansing of New York took the oath of office as Counselor for the Department of State. On June 9, 1915, he was, upon the resignation of Mr. Bryan, designated Secretary of State *ad interim*, and on June 23, 1915, he was appointed Secretary of State of the United States.

This is indeed rapid promotion, but it is justified, although perhaps hardly explained, by the fact that Mr. Lansing's selection as Counselor was based solely upon merit, as evidenced by the ability and capacity he had shown during a period of more than twenty years in various

[1] Although Mr. Lansing is a member of the Board of Editors of the Journal, it should be stated that he has had no knowledge of and has not been consulted in any way in the preparation of this comment.—Ed.

positions of trust under the Government, beginning with the Behring Sea Arbitration of 1892. The successful performance of the many delicate and varied duties of the Counselorship during the storm and stress of the great war justified his appointment as Secretary *ad interim*, and indeed a failure to designate him as such would have been contrary to precedent, as Mr. Lansing was the ranking officer of the Department under the Secretary of State and was Acting Secretary during the Secretary's absence.

The appointment as Secretary would have been justified by the years of experience preceding his Counselorship and by the mastery of affairs shown by Mr. Lansing during his tenure of this office, because it is an open secret, or, rather, it is common knowledge, that, as Counselor and as Secretary Bryan's chief assistant he handled the questions arising out of the war, which required a knowledge of international law and of diplomatic precedent. It was fitting, therefore, that Mr. Lansing should be appointed Secretary, and the President was amply justified in appointing him.

However, a knowledge of international law and of diplomatic precedent, while justifying, fails to explain, or explains but inadequately, the selection, because the Secretaryship of State requires, in addition, wit and wisdom, which are "born with a man," and it is unfortunately true, to quote again the happy phrase of one seasoned by years of public service, that "No man is the wiser for his learning." But it is believed that even wit and wisdom do not wholly account for the appointment. The United States is passing through a great crisis. Mr. Wilson, as President of the United States, is responsible for the foreign relations of the country, and it is essential that he have as Secretary of State one with whom he can work in easy and harmonious coöperation and in whose tact, judgment and discretion, as well as knowledge, he has complete and unlimited confidence. He knows from experience that Mr. Lansing possesses these qualifications, and as these qualifications are necessary to maintain the neutrality of the United States in the great war, by which we are not only industrially and commercially affected, but which influences our policy as well, the President disregarded precedent, which ordinarily suggests if it does not require the appointment of a political leader, and selected the man who, to his own knowledge, possessed the necessary qualifications for the Secretaryship of State in the crisis through which we are passing, and with whom, as shown by experience, he could work with the ease and harmony necessary for the dispatch of public affairs.

Mr. Lansing had become familiar with the business of the Department and had shown himself to be possessed of the qualities which Mr. Wilson properly deemed to be essential. He was therefore appointed Secretary of State.[2]

Mr. Lansing's selection has been welcomed both by the press and by the public. It is, however, a peculiar pleasure to his fellow members of the American Society of International Law and to his associate editors of the American Journal of International Law, for Mr. Lansing was in a very special sense both a founder of the Society and of its Journal of International Law.

At the Lake Mohonk Conference on International Arbitration, held in 1905, Mr. Robert Lansing and Mr. James Brown Scott attended the Conference and interested its members in the formation of the American Society of International Law. Professor George W. Kirchwey, of Columbia University, with whom they had previously discussed the feasibility of forming such a society, moved at their request that "this Conference regards with favor the movement to establish a society of international law in the United States and of an American Journal of International Law, and pledges its earnest sympathy with the aims and purposes of such movement." A committee of seven was appointed, of which Mr. Oscar Straus was chairman and of which Mr. Lansing was one, to consider the formation of the Society, which reported at the final session of the Conference and recommended that an American Society of International Law be formed, that a Journal of International Law be established in connection therewith, and that a committee of representative gentlemen be selected in order to organize the Society upon a permanent basis. These recommendations were warmly approved by the Conference, and after much consideration and thought by Mr. Straus and the members of the committee the Society was permanently organized and a constitution adopted at a meeting of interested persons, held January 12, 1906, in the rooms of the Bar Association of the City of New York. At this meeting Mr. Lansing was elected a member of the Executive Council, and continues to serve as such. He was also elected a member of the Executive Committee of the Society as originally formed, and still continues to be a member.

At the meeting of the Lake Mohonk Conference on International Arbitration, held in 1906, the Executive Council of the Society decided

[2] For a brief sketch of Mr. Lansing's career, upon his appointment as Counselor of the Department of State, see this JOURNAL for 1914, Vol. 8, pp. 336–8.

to publish the Journal of International Law as its organ and appointed Mr. James Brown Scott its managing editor, with power to name an editorial board of not less than seven to coöperate with him in editing the Journal. Mr. Lansing was one of the seven, and Messrs. Lansing and Scott determined the content of the Journal and all the details of its publication, and Mr. Lansing contributed to the first number an article modestly entitled, "Notes on Sovereignty in a State." He has been from the first number, and is still, an editor of the Journal, to which he has contributed signed articles, editorial comments, and book reviews. He has attended the annual meetings of the Society, at which he has read papers, and has taken part in the discussions on the floor.

His fellow members of the American Society of International Law and his colleagues on the Board of Editors of the American Journal of International Law wish him well.

THE USE OF POISONOUS GASES IN WAR

Charges have appeared in the public press that the German army in the west has been using poisonous gases against the Allied armies. The German authorities are reported by the press to admit the truth of these charges, but they insist that the Allies first employed them and that they are merely following suit.

The JOURNAL does not know the truth of the charges and cannot settle the question of priority. It would appear, however, that such action on the part of any belligerent is unjustifiable, as a signed declaration of the First Hague Peace Conference of 1899 forbids this means of warfare. The text of the declaration is as follows:

> The contracting Powers agree to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases.
>
> The present Declaration is only binding on the contracting Powers in the case of a war between two or more of them.
>
> It shall cease to be binding from the time when, in a war between the contracting Powers, one of the belligerents shall be joined by a non-contracting Power.

This declaration has had the good fortune to be ratified by all of the belligerents without reservations of any kind, and it would therefore seem to be binding upon them, supposing that any convention solemnly agreed to by the parties regulating their conduct in war is to govern their action.

It hardly needs to be argued that the contracting Powers intended the declaration to bind them, because provision is made for its denunciation in the following manner:

> In the event of one of the high contracting parties denouncing the present Declaration, such denunciation shall not take effect until a year after the notification made in writing to the Government of the Netherlands, and forthwith communicated by it to all the other contracting Powers.
>
> This denunciation shall only affect the notifying Power.

So far as known, no contracting country has denounced the declaration. It is interesting to note that the United States is not a party to this declaration.

THE SPECIAL SUPPLEMENT OF DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES CONCERNING THE WAR

The Journal is happy to inform its readers that the arrangement announced in its last issue (pages 474–475) for the publication of a special supplement containing a collection of the diplomatic correspondence of the United States with other powers concerning questions arising out of the European war has been completed and that the special supplement is now on the press and will be issued within a very short time.

Owing to the large amount of material in the special supplement it has been impracticable to prepare it and get it through the press in time to be sent with this issue of the Journal. For this reason and for the additional reason that the postal regulations will not permit the special supplement to be mailed under the same cover with the regular edition of the Journal, it was considered advisable to send the Journal to our readers at once and let the supplement follow as soon as its printing can be completed.

The special supplement will be considerably larger that the editors had anticipated. Instead of a volume of approximately one hundred pages, the average size of regular issues of the supplement, the special supplement will contain between four and five hundred pages. The correspondence is divided into twenty-four parts according to subjects, as follows:

Part 1. Correspondence relating to the status of the Declaration of London during the war.

Part 2. Papers relating to articles listed as contraband of war, in-

cluding correspondence with Great Britain, France, Russia, Germany, Austria-Hungary and Turkey.

Part 3. Correspondence relating to restraints on commerce, which includes correspondence with Great Britain concerning interference with American trade, correspondence with Germany concerning the war zone decree and submarine activity, and correspondence with Germany and Austria-Hungary relating to the export of munitions of war.

Part 4. Correspondence relating to the cargo of foodstuffs on the American ship *Wilhelmina* in the British prize court.

Part 5. Correspondence relating to the destruction of the American merchantman *William P. Frye* by the German cruiser *Prinz Eitel Friedrich*.

Part 6. Proclamations of neutrality and papers relating to neutrality.

Part 7. Violations of neutrality—Panama Canal.

Part 8. Violations of neutrality by belligerent warships.

Part 9. Defensive armament and the right of departure from neutral ports of belligerent merchant ships to arm at sea.

Part 10. Internment of the German ships *Geier* and *Locksun*.

Part 11. Questions relating to neutrality.—Correspondence between the Secretary of State and the Chairman of the Senate Committee on Foreign Relations.

Part 12. Transmission of mail of American diplomatic and consular officers.

Part 13. Censorship of telegrams transmitted by cable and wireless.

Part 14. Belgian relief.

Part 15. Attempt of German ship *Odenwald* to sail without clearance papers.

Part 16. Detention of the American merchant ship *Seguranca*.

Part 17. Detention of the American ship *Wico*.

Part 18. Internment of the German warship *Prinz Eitel Friedrich*.

Part 19. Internment of the German cruiser *Kronzprinz Wilhelm*.

Part 20. Detention of August Piepenbrink.

Part 21. Internment of the German prize ship *Farn*.

Part 22. Non-contraband character of hydroaeroplanes.

Part 23. Dual nationality.

Part 24. Circular instructions and correspondence relating to the issuing of passports.

PORFIRIO DIAZ

Porfirio Diaz, the former president of Mexico, and one of the most remarkable figures in the modern history of Latin America, died in Paris on July 2nd last, an exile from the country in which for thirty-one years he was not only the ruler, but, in the words of Louis XIV, "*l'etat; c'est moi.*" From 1876 until 1911, Mexico was Diaz, and Diaz was Mexico. Within those dates, our sister republic saw its most prosperous epoch and experienced a material progress which lifted it from the condition of an undeveloped and backward nation into the rank of a leading nation of the world, with the prospect before it of a further industrial and commercial development not unlike that which had already come to the United States. The five years which have elapsed since Diaz was driven into exile, have been some of the saddest years in the history of Mexico, and as yet she sees little sign of better days. No contrast more vivid and more tragic can be found between the pages of her history. It is worth while to look a little closely into the causes underlying this extraordinary transformation; and in doing so we must briefly recount the life of this remarkable man.

Porfirio Diaz was born in 1830 at Oaxaca, a region which has since produced more than its quota of radical leaders. His father was an innkeeper, and one-eighth of his blood was Indian. Orphaned when three years old, he was educated under the patronage of the bishop of Oaxaca, who destined him for the church. At the age of seventeen, he enlisted for the war with the United States, but saw little fighting. He went back to Oaxaca, and was a professor in the Law Institute there when the radical uprising against Santa Anna broke out. Diaz joined the rebels, was proscribed, and thereafter continued his career as a soldier. There followed the crusade against the church, then all powerful in Mexico, under the leadership of Benito Juarez. Diaz was one of his generals, and proved himself a soldier of great daring and brilliant strategy. In the internal war of 1855–61, he commanded the army which saved Mexico City and the Congress from the clerical attack. It was at this juncture that Mexico faced the international crisis arising out of the repudiation by the Juarez government of securities held by citizens of Spain, France and England, which countries landed joint armaments at Vera Cruz in October, 1861. When the schemes of Napoleon III for extending his imperialistic plans became evident, Spain and England withdrew. The

French remained at Vera Cruz, and in 1862 advanced on Puebla, where they were met and defeated by General Diaz. But a year later another French army was dispatched to Mexico, which besieged Diaz at Puebla, and forced his surrender after desperate fighting. The capture of Mexico City and the installation of Maximilian as Emperor of Mexico soon followed. Then ensued a protracted guerilla warfare, in which Diaz went through extraordinary adventures, was several times captured and escaped, and finally recaptured Puebla, repulsed the Imperialist army advancing from Mexico City, and on June 21, captured the capital, two days after Maximilian had surrendered at Queretara. It was the intervention of the United States, at the close of the Civil War, which made possible the expulsion of the French invaders; but the military glory of the achievement belonged to Diaz, and made him the idol of the Mexican people.

Diaz might then have taken the presidency of the Republic; but loyalty to his old chief Juarez dictated his retirement to the estate near Oaxaca given him by the people of that state. More disorders followed; in 1872, Juarez dying, Lerdo de Tejada became president under the Constitution. His four years' term was marked by a series of conspiracies and insurrections, with the people discontented and impoverished. Finally in 1876, Diaz, going to Texas, there organized a revolution in the radical northern provinces. His resources were inadequate; he was defeated in battle after battle, and after a series of hairbreadth escapes, he succeeded in reaching the south, where he again raised an army, and at the great battle of Tecoac defeated the Lerdistas, and in November, 1876, became the President of Mexico.

Diaz devoted his first term to the restoration of order and to efforts to reconcile the political factions by which the nation was torn. He retired at the end of four years to make way for Gonzales, and during the latter's term of office, he travelled extensively in the United States. In 1884, it was generally recognized that he was the only man who could save Mexico from herself; he was elected President again, and remained in the office without serious opposition, until 1911.

There followed what is generally regarded as the golden era in the history of Mexico. A transformation began almost immediately. The President encouraged the building of railroads and telegraphs, the development of mines and plantations, water works, sanitation. He beautified and extended the capital city, built opera houses, and above all else, established a system of free public education and put the re-

public on a sound financial basis. Foreign capital quickly gained confidence and flowed into the country from Europe and the United States, greatly to its benefit and development. Diaz gathered about him administrators and financiers of recognized ability, and the machinery of government was efficient. The thirty years of his presidency, during which he was sometimes re-elected by methods recognized as extra-constitutional, marked an era of industrial and economic growth never previously known in Mexico, and hardly surpassed in the United States during the same time.

But throughout the later years of his regime the embers of discontent and revolution were smouldering in Mexico, and the government only rested secure upon the army. The administration of the criminal law was a farce, and the courts were notoriously venal and incompetent. Administrative scandals arose; many of the president's official adherents were undoubtedly corrupt and more than one was false to him; but it must be said for him personally that he accumulated no fortune and died a comparatively poor man.

As Diaz grew old, his iron grip upon the situation gradually loosened; his splendid army dwindled to a skeleton; men whom he trusted intrigued against him. General Bernardo Reyes, the Governor of Nuevo Leon, organized an insurrection, and was promptly put in jail; but after him came Francisco I. Madero, a political dreamer not unlike the type of the French revolutionist. He started a revolution in San Antonio, and conducted a presidential campaign from within the walls of a prison. But the insurrection grew from guerilla outbreaks into a widely extended revolution, with which a honeycombed government was unable to cope. Discouraged, disgusted and worn out, Diaz resigned on May 5, 1911, and at once left the country, never to return.

What has happened to our unfortunate neighbor since is still current history; what will happen to it in the future, no man can foretell. But truth compels the statement that the happiest and most progressive epoch in Mexico's history was the thirty years of Diaz's supremacy. Following the establishment of Mexican independence in 1810, down to 1876, the country was in the hands of seventy-nine executive heads, including an emperor, many presidents, many dictators, and never with a firm government. As time passes, the conviction will grow that Diaz was its wisest as well as its strongest ruler. But it must be admitted that the Diaz regime was fatal to itself. It was not a government founded upon the solid rock of representative institutions, and no democracy can

live which is governed in any other way. Porfirio Diaz will live in history as one of the great generals of his country; he will live as a great executive, who realized the splendid possibilities of Mexico, who knew its weakness and sought to educate his people. But it is true that his policy aimed at the exploitation of the Mexican nation rather than its development on the broad lines that must underlie democratic institutions.

We cannot close this inadequate sketch of a useful and remarkable career without recording the fact that President Diaz was always a firm friend of the United States. During the long period of his supremacy, no diplomatic misunderstandings arose which were not peaceably adjusted in the spirit of true friendship. He shares with President Roosevelt the honor of submitting the first international controversy to the Hague tribunal for determination, by promptly accepting the offer of the United States to refer to the decision of that tribunal the controversy over what is known as "The Pious Fund of the Californias." In so doing the two American republics not only vivified The Permanent Court of Arbitration at The Hague, but set an example to all the world, which has since been followed in many instances for the settlement of international disputes. In his honor an American president went outside American territory for the first time when President Taft visited him at Ciudad Juarez in October, 1909.

THE WILLIAM P. FRYE CASE

In our last issue (page 497) a summary was given of the negotiations between the United States and Germany over the sinking of the American vessel *William P. Frye* by the German auxiliary cruiser *Prinz Eitel Friedrich*. It appeared at that time that Germany had admitted liability under the treaties between the United States and Prussia of 1799 and 1828 for the damages sustained by American citizens, but held that the case should be submitted to the German prize court at Hamburg. It also appeared that the United States did not see any reason for submitting the case to the German prize court. Germany having admitted her liability under the treaties, the status of the claimants and the amount of the indemnity were the only questions remaining to be settled, which the United States suggested could be more properly dealt with through diplomatic channels.

From the correspondence exchanged since that time, however, it is

apparent that the question is not one of such easy solution as the United States thought. It now transpires that Germany's admission of liability was not intended to include an admission that the treaties with Prussia had been violated by the sinking of the *Frye*. Germany asserts that the recognition by Article 13 of the treaty of 1799 of the right of a belligerent to stop contraband supplies on their way to an enemy implies the right in extreme cases to effect this purpose by the destruction of the ship, and that the treaty merely obligates the party at war to compensate the neutral for the damages sustained, whatever be the manner adopted for stopping the contraband supply. It is further asserted that, since the Prussian-American treaties contain no stipulations as to how the amount of this compensation is to be fixed, and since, according to the general principles of international law, the exercise of the right of control over trade in contraband is subject to the decision of the prize courts, the question of compensation must be submitted to the German prize court for determination.

The United States maintains that there is no justification in the treaty stipulations for the sinking of the *Frye*, but, on the contrary, that the belligerent right to deal with contraband, recognized in the treaty, is limited by the express stipulation of Article 13 of the treaty of 1799 that "in the case supposed of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not in that case be carried into any port, nor further detained, but shall be allowed to proceed on her voyage." The character of the cargo, for which, incidentally, the United States makes no claim because it was not American property at the time of seizure, is, in the view of the United States, irrelevant as far as the justification of the sinking of the vessel is concerned. If the cargo of the *Frye* was non-contraband, the destruction of either the vessel or the cargo was not justified under the circumstances according to any rule of international law; if it was contraband, the *Frye* should have been allowed to proceed upon delivering it out in accordance with the provisions of Article 13, just quoted.

The United States also relies on Article 12 of the treaty of 1785 with Prussia, the material portion of which will be quoted for convenience of reference.

> If one of the contracting parties should be engaged in war with any other Power, the free intercourse and commerce of the subjects or citizens of the party remaining neuter with the belligerent Powers shall not be interrupted. On the contrary, in that case,

as in full peace, the vessels of the neutral party may navigate freely to and from the ports and on the coasts of the belligerent parties, free vessels making free goods, insomuch that all things shall be adjudged free which shall be on board any vessel belonging to the neutral party, although such things belong to an enemy of the other.

For the foregoing reasons, it was maintained that the claim presented by the American Government is for an indemnity for a violation of the treaty, in distinction from an indemnity in accordance with the treaty, which sort of claim is a matter for diplomatic adjustment and is in no way dependent upon the action of the German prize court.

In support of her interpretation of the treaties, Germany disposes of Article 12 of the treaty of 1785, by alleging that it merely formulates general rules for the freedom of maritime intercourse, and leaves untouched the question of contraband, which is specifically dealt with in the following article, now in force as Article 13 of the treaty of 1799. The pertinent parts of this article will also be quoted for convenience of reference:

And in the same case of one of the contracting parties being engaged in war with any other Power, to prevent all the difficulties and misunderstandings that usually arise respecting merchandise of contraband, such as arms, ammunition, and military stores of every kind, no such articles carried in the vessels, or by the subjects or citizens of either party, to the enemies of the other, shall be deemed contraband, so as to induce confiscation or condemnation and a loss of property to individuals. Nevertheless, it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding, paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors; and it shall further be allowed to use in the service of the captors the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination. But in the case supposed of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not in that case be carried into any port, nor further detained, but shall be allowed to proceed on her voyage.

In order to prevent neutral vessels from carrying war supplies to her adversary, Germany claims that she has the right under this article to detain the ship and cargo for such length of time as she may think necessary, or to take over the war supplies for her own use upon paying full value for them. It is pointed out that the right of sinking is not mentioned in the treaty and is therefore neither expressly permitted nor expressly prohibited, so that on this point the treaty must be supplemented by the general rules of international law. The sinking of the

Frye is justified by her according to what she claims to be the general rules of international law, as follows:

> The cargo consisted of conditional contraband, the destination of which for the hostile armed forces was to be presumed under the circumstances; no proof to overcome this presumption has been furnished. More than half the cargo of the vessel was contraband, so that the vessel was liable to confiscation. The attempt to bring the American vessel into a German port would have greatly imperilled the German vessel in the given situation of the war, and at any rate practically defeated the success of her further operations. Thus the authority for sinking the vessel was given according to general principles of international law.

The sinking of the vessel being not prohibited by the treaty but justified under international law, Germany proceeds to argue that the clause in the treaty which provides that the vessel stopped shall be allowed to proceed on delivering out the contraband goods cannot be considered when the ensuing loss of time imperils either the warship herself or the success of her other operations.

The question whether the German commander acted legally according to the general principles of international law was, according to the German view, primarily a subject for the consideration of the German prize court. Germany claims that she is not obligated under international law to grant compensation for a vessel lawfully sunk, and if the prize court should determine that the German commander's act was legal, Germany's only obligation would be to pay the compensation for her lawful act specially provided by the treaty of 1799.

Pending the diplomatic discussion, Germany submitted the case to the prize court at Hamburg, which justified the sinking of the vessel under the principles of international law in the manner above outlined. The prize court was, however, unable to fix the amount of the indemnity due under the Prussian-American treaty because the interested parties failed to submit the necessary data. It is necessary therefore to settle the amount of the indemnity in a different way, and Germany suggests that each government designate an expert, who will jointly fix the amount of the indemnity for the vessel and any American property which may have been sunk with her. Germany makes the reservation, however, that such a payment will not constitute satisfaction for the violation of American treaty rights "but a duty or policy of this government founded on the existing treaty stipulations." Should this manner of settlement be unacceptable to the United States, Germany agrees to submit the dispute as a question of the interpretation of the treaties to

the tribunal at The Hague, pursuant to Article 38 of the Hague convention for the pacific settlement of international disputes.

The United States on August 10, 1915, agreed to the appointment of experts to determine the amount of the indemnity, and accepted the condition upon which it would be paid, provided that "the acceptance of such payment should be understood to be without prejudice to the contention of the Government of the United States that the sinking of the *Frye* was without legal justification, and provided also that an arrangement can be agreed upon for the immediate settlement by arbitration of the question of legal justification in so far as it involves the interpretation of existing treaty stipulations."

It will thus be seen that the real issue between the two governments is not as to the payment or the amount of the indemnity for the sinking of the *Frye*, but as to Germany's right to sink American vessels in the face of the provisions of the treaties with Prussia invoked by the United States. The United States is willing to accept an indemnity, to be determined, as to its amount, by properly qualified persons appointed by the two governments, but it is not willing to accept it with any reservations as to the legality of Germany's act, unless at the same time provision be made for finally determining the legal questions involved. If arbitration be agreed upon, the United States proposes that a modus vivendi be reached as to the conduct of Germany's naval operations in this respect, pending the award. The situation of the belligerents upon the sea at the present time leaves no fear of a repetition in the near future of incidents such as the sinking of the *Frye*, but it is believed that the demand of the United States is a wise and proper safeguard against the recurrence of acts which, if committed at an inopportune time, might lead to unfortunate results.

THE NEUTRALITY OF BELGIUM

In the issue of the Journal for October, 1914, there were two editorial comments, entitled, respectively, "The War in Europe" (pages 853–857) and "Germany and the Neutrality of Belgium" (pages 877–881). The comments aimed to be impartial, and they appear to have impressed as such a well-informed and distinguished German publicist, Dr. Karl Neumeyer, Professor of International Administrative Law at the University of Munich, who on January 26, 1915, wrote in regard to them the following letter:

With sincere satisfaction, I inferred from the last number of the American Journal of International Law, that the direction of the publication endeavors to observe the strictest impartiality during the world conflict that is staggering Europe; and I rejoice on account of the tactful manner in which this endeavor is being carried out.

But with your permission, I shall advert to just one point of its contents. For in Germany, we consider it essential to bring our way of looking at things to the notice of the people in America. This refers to the discussion on page 855 of the causes that induced England to take part in the war. We believe that these causes were of an economic character, entirely independent of the neutrality of Belgium; and I have the honor to send you by this same post, a printed document in reference thereto, presenting official data upon this matter. According to this document, the reprinted utterance of the Imperial Chancellor of August fourth was essentially supplemented by his speech of December second, which accordingly I forward to you also.

I am glad that in these difficult times, which are also a source of great harm to the science of international law, it is yet possible to exchange a dispassionate correspondence.

Apparently Dr. Neumeyer does not object to the statements contained in pages 855 and 880, but believes that they should be supplemented by the official reports found in the secret archives of the Belgian Government upon the German occupation of Brussels in October, 1914, printed in the pamphlet entitled "Belgian Neutrality" and the speech of the Imperial Chancellor, Dr. von Bethmann Hollweg, delivered in the Reichstag December 2, 1914, both of which he was good enough to enclose in his letter.

The first passage in the Journal's editorial referred to in Dr. Neumeyer's letter appears to be:

> Great Britain, as a party to the treaty guaranteeing the neutrality of Belgium, demanded that Germany respect the guarantees of that treaty, to which she was also a party. Germany declined to comply with this demand and Great Britain on August 4th declared war.[1]

Dr. Neumeyer pictures his countrymen as believing that Great Britain's causes of war were "of an economic character, entirely independent of the neutrality of Belgium." The JOURNAL stated that Great Britain based its declaration of war upon the refusal of Germany to respect the neutrality of Belgium. The JOURNAL did not then, nor does it now, attempt to decide whether the contentions of one government or the other are correct, and in confirmation thereof the following additional passage from page 855 is quoted:

[1] This JOURNAL, Vol. 8, p. 855.

Upon whom rests the grave responsibility for the outbreak of the war and its inevitable results? It is not for the JOURNAL to attempt to say. We refer our readers without comment to the official communications which preceded the opening of hostilities, published by Great Britain and Germany and reprinted in the Supplement to this issue. In them will be found the official views as to the causes of the war and the reasons for and the facts upon which those views are based. Each reader may peruse them and draw his own conclusion.

In regard to the second passage from the JOURNAL's editorial referred to by Dr. Neumeyer it is probable that he had in mind the following paragraphs:

> On August 4, 1914, Dr. von Bethmann Hollweg, Chancellor of the German Empire, said, in a speech to the Reichstag, as quoted in the London Times of August 11, 1914:
>
> "Gentlemen, we are now in a state of necessity, and necessity knows no law! Our troops have occupied Luxemburg, and perhaps already are on Belgian soil. Gentlemen, that is contrary to the dictates of international law. It is true that the French Government has declared at Brussels that France is willing to respect the neutrality of Belgium as long as her opponent respects it. We knew, however, that France stood ready for the invasion. France could wait, but we could not wait. A French movement upon our flank upon the lower Rhine might have been disastrous. So we were compelled to override the just protest of the Luxemburg and Belgian Governments. The wrong —I speak openly—that we are committing we will endeavor to make good as soon as our military goal has been reached. Anybody who is threatened, as we are threatened, and is fighting for his highest possessions can have only one thought—how he is to hack his way through (*wie er sich durchhaut*)!"
>
> It therefore appears that the Chancellor knew and admitted that the occupation of Belgium and Luxemburg was contrary to international law, but he justified the act by the statement that the German Empire was "in a state of necessity" and that "necessity knows no law." [2]

The JOURNAL has, since the outbreak of the war, discussed questions arising out of it, and has sought to apply appropriate principles of international law to the questions discussed. In so doing, however, it has not attempted to pass judgment upon the comparative guilt or innocence of particular belligerents in causing the war. It is believed that the attitude to be observed by a journal of international law, published in a neutral country, and which endeavors to be neutral in its utterances, should not be different from the state of neutrality referred to by Mr. John Quincy Adams, Secretary of State, in an instruction, dated May 19,

[2] The JOURNAL, Vol. 8, p. 880.

1818, to Mr. Gallatin, then United States Minister to France, as follows:

> By the usual principles of international law, the state of *neutrality* recognizes the cause of both parties to the contest as *just*—that is, it avoids all consideration of the merits of the contest.[3]

The JOURNAL therefore believes that it should print the documents referred to by Dr. Neumeyer which appeared after the period covered by the October number of the JOURNAL, and which, in his opinion, qualify or supplement the statements contained in that number, namely, the official reports found in the secret archives of the Belgian Government, and the speech of the Imperial Chancellor delivered in the Reichstag on December 2, 1914. To these should be added an interview of the Chancellor with a representative of the Associated Press dated January 24, 1915, and published the next day in the American papers. These three documents are to be taken as official statements of the German Government.[4]

The despatch of Sir Edward Goschen, the British Ambassador at Berlin, respecting the rupture of diplomatic relations with the German Government in which the "scrap of paper" incident was first made known, is printed in full in the SUPPLEMENT to this JOURNAL for October, 1914, p. 411, but fairness and the impartiality of neutrality require that there be printed Sir Edward Grey's statement of January 26, 1915, which comments upon the contentions set forth in the speech of the Imperial Chancellor of December 2, 1914, and in his interview of January 24th. The material portion of this document is therefore herein laid before the reader without comment.

[3] VII Moore's International Law Digest, p. 860.

[4] The pamphlet entitled *Die Belgische Neutralität*, issued by Georg Stilke in Berlin in 1914, which Professor Neumeyer was good enough to send to the Editor-in-Chief of the JOURNAL, contains, in addition to the Belgian documents, an Introduction and four long extracts from the *Norddeutsche Allgemeine Zeitung* for October 13, 1914, November 25, 1914, December 2, 1914, and December 15, 1914.

The introduction and the extracts have been omitted to make room for the interview of the Imperial Chancellor, Dr. von Bethmann Hollweg, and the statement of the British Secretary of State for Foreign Affairs, Sir Edward Grey, which are printed in the text.

The translation here printed of the Belgian documents is that issued by Dr. Bernhard Dernburg in his pamphlet entitled *The Case of Belgium*, published in 1914.

I. OFFICIAL REPORTS FOUND IN THE SECRET ARCHIVES OF THE BELGIAN GOVERNMENT UPON THE GERMAN OCCUPATION OF BRUSSELS, OCTOBER 1914.

I. REPORT OF GENERAL DUCARME, CHIEF OF THE BELGIAN GENERAL STAFF, TO THE BELGIAN MINISTER OF WAR.

Confidential.

Letter to the Minister Concerning the Confidential Conversations.

BRUSSELS, *April 10, 1906.*

Mr. Minister:

I have the honor to report to you briefly about the conversations which I had with Lieutenant-Colonel Barnardiston and which have already been the subject of my oral communications.

The first visit took place in the middle of January. Mr. Barnardiston referred to the anxieties of the General Staff of his country with regard to the general political situation, and because of the possibility that war may soon break out. In case Belgium should be attacked, the sending of about 100,000 troops was provided for.

The Lieutenant-Colonel asked me how such a measure would be regarded by us. I answered him, that from a military point of view it could not be but favorable, but that this question of intervention was just as much a matter for the political authorities, and that, therefore, it was my duty to inform the Minister of War about it.

Mr. Barnardiston answered that his Minister in Brussels would speak about it with our Minister of Foreign Affairs.

He proceeded in the following sense: The landing of the English troops would take place at the French coast in the vicinity of Dunkirk and Calais, so as to hasten their movements as much as possible. The entry of the English into Belgium would take place only after the violation of our neutrality by Germany. A landing in Antwerp would take much more time, because larger transports would be needed, and because on the other hand the safety would be less complete.

This admitted, there would be several other points to consider, such as railway transportation, the question of requisitions which the English army could make, the question concerning the chief command of the allied forces.

He inquired whether our preparations were sufficient to secure the defense of the country during the crossing and the transportation of the English troops—which he estimated to last about ten days.

I answered him that the places Namur and Liège were protected from a "coup de main" and that our field army of 100,000 men would be capable of intervention within four days.

After having expressed his full satisfaction with my explanations, my visitor laid emphasis on the following facts: (1) that our conversation was entirely confidential; (2) that it was not binding on his government; (3) that his Minister, the English General Staff, he and I were, up to the present, the only ones informed about the matter; (4) that he did not know whether the opinion of his Sovereign has been consulted.

* * * * * * * * * * * * *

In a following discussion Lieutenant-Colonel Barnardiston assured me that he had never received confidential reports of the other military attachés about our army. He then gave the exact numerical data of the English forces; we could depend on it, that in 12 or 13 days 2 army corps, 4 cavalry brigades and 2 brigades of horse infantry would be landed.

He asked me to study the question of the transport of these forces to that part of the country where they would be useful, and he promised to give me for this purpose details about the composition of the landing army.

He reverted to the question concerning the effective strength of our field army, and he emphasized that no detachments should be sent from this army to Namur and Liège, because these places were provided with garrisons of sufficient strength.

He asked me to direct my attention to the necessity of granting the English army the advantages which the regulations concerning the military requisitions provided for. Finally he insisted upon the question of the chief command.

I answered him that I could say nothing with reference to this last point and promised him that I would study the other questions carefully.

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Later on the English Military Attaché confirmed his former calculations: 12 days would at least be necessary to carry out the landing at the French coast. It would take a considerably longer time (1 to 2½ months) to land 100,000 men in Antwerp.

Upon my objection that it would be unnecessary to await the end of the landing in order to begin with the railway transportations, and that it would be better to proceed with these, as when the troops arrived at the coast, Lieutenant-Colonel Barnardiston promised to give me exact data as to the number of troops that could be landed daily.

As regards the military requisitions, I told my visitor that this question could be easily regulated.

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The further the plans of the English General Staff progressed, the clearer became the details of the problem. The Colonel assured me that one-half of the English army could be landed within 8 days; the rest at the conclusion of the 12th or 13th day, with the exception of the Horse Infantry, which could not be counted upon until later.

In spite of this I thought I had to insist again upon the necessity of knowing the exact number of the daily shipments, in order to regulate the railway transportation for every day.

The English Military Attaché conversed with me about several other questions, namely:

(1) The necessity of keeping the operations secret and of demanding strict secrecy from the Press;

(2) The advantages which would accrue from giving one Belgian officer to each English General Staff, one interpreter to each commanding officer, and gendarmes to each unit of troops, in order to assist the British police troops.

* * * * * * * * * * * * * *

In the course of another interview Lieutenant-Colonel Barnardiston and I studied

the combined operations to take place in the event of a German offensive with Antwerp as its object and under the hypothesis of the German troops marching through our country in order to reach the French Ardennes.

In this question, the Colonel said he quite agreed with the plan which I had submitted to him, and he assured me also of the approval of General Grierson, Chief of the English General Staff.

Other secondary questions which were likewise settled, had particular reference to intermediary officers, interpreters, gendarmes, maps, photographs of the uniforms, special copies, translated into English, of some Belgian regulations, the regulations concerning the import duties on English provisions, to the accommodation of the wounded of the allied armies, etc. Nothing was resolved on as regards the activity which the Government or the Military authorities might exert on the Press.

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During the final meeting which I had with the British Attaché, he informed me about the numbers of troops which would be daily disembarked at Boulogne, Calais and Cherbourg. The distance of the last place, which is necessary for technical considerations, will involve a certain delay. The first Corps would be disembarked on the 10th day, and the second on the 15th day. Our railways would carry out the transportation so that the arrival of the first Corps, either in the direction of Brussels-Louvain or of Namur-Dinant, would be assured on the 11th day, and that of the second on the 16th day.

I again, for a last time, and as emphatically as I could, insisted on the necessity of hastening the sea-transports so that the English troops could be with us between the 11th and 12th day. The happiest and most favorable results can be reached by a convergent and simultaneous action of the allied forces. But if that co-operation should not take place, the failure would be most serious. Colonel Barnardiston assured me that everything serving to this end would be done.

* * * * * * * * * * * * * *

In the course of our conversations, I had occasion to convince the British Military Attaché that we were willing, so far as possible, to thwart the movements of the enemy and not to take refuge in Antwerp from the beginning.

Lieutenant-Colonel Barnardiston on his part told me that, at the time, he had little hope for any support or intervention on the part of Holland. At the same time he informed me that his Government intended to transfer the basis of the British commissariat from the French coast to Antwerp as soon as all German ships were swept off the North Sea.

* * * * * * * * * * * * * *

In all our conversations the Colonel regularly informed me about the secret news which he had concerning the military circumstances and the situation of our Eastern neighbors, etc. At the same time he emphasized that Belgium was under the imperative necessity to keep herself constantly informed of the happenings in the adjoining Rhinelands. I had to admit that with us the surveillance-service abroad was, in times of peace, not directly in the hands of the General Staff, as our legations had no Military Attachés. But I was careful not to admit that I did not know whether the espionage service which is prescribed in our regulations, was in working

order or not. But I consider it my duty to point out this position which places us in a state of evident inferiority to our neighbors, our presumable enemies.

Major-General, Chief of the General Staff.

(Initials of Gen. Ducarme.)

Note. When I met General Grierson at Compiègne, during the manoeuvres of 1906, he assured me the result of the re-organization of the English army would be that the landing of 150,000 would be assured and, that, moreover, they would stand ready for action in a shorter time than has been assumed above.

Concluded September, 1906.

(Initials of General Ducarme.)

2. MINUTES OF A CONFERENCE, DATED APRIL 23 (1912?) BETWEEN THE BELGIAN CHIEF OF THE GENERAL STAFF, GENERAL JUNGBLUTH, AND THE BRITISH MILITARY ATTACHÉ, LIEUTENANT-COLONEL BRIDGES.

Confidential.

The British Military Attaché asked to see General Jungbluth. The two gentlemen met on April 23rd.

Lieutenant-Colonel Bridges told the General that England had at her disposal an army which could be sent to the Continent, composed of six divisions of infantry and eight brigades of cavalry—together 160,000 troops. She has also everything which is necessary for her to defend her insular territory. Everything is ready.

At the time of the recent events, the British Government would have immediately effected a disembarkment in Belgium (chez nous), even if we had not asked for assistance.

The General objected that for that our consent was necessary.

The Military Attaché answered that he knew this, but that—since we were not able to prevent the Germans from passing through our country—England would have landed her troops in Belgium under all circumstances (en tout état de cause).

As for the place of landing, the Military Attaché did not make a precise statement; he said that the coast was rather long, but the General knows that Mr. Bridges, during Easter, has paid daily visits to Zeebrugge from Ostende.

The General added that we were, besides, perfectly able to prevent the Germans from passing through.

3. EXTRACT FROM REPORT OF BARON GREINDL, BELGIAN MINISTER IN BERLIN, TO THE BELGIAN MINISTER OF FOREIGN AFFAIRS.[5]

BELGIAN LEGATION, BERLIN, *December 23, 1911.*

No. 3022–1626.

Strictly Confidential.

What is Belgium to do in case of war?

Mr. Minister:

I have had the honour to receive the dispatch of the 27 November last, P without docket-number, registration number 1108, * * *

[5] The entire despatch has apparently not been published, but that portion of it made public and printed by Dr. Dernburg in his pamphlet, *The Case of Belgium* is here reproduced.

From the French side danger threatens not only in the south of Luxemburg, it threatens us on our entire joint frontier. We are not reduced to conjectures for this assertion. We have positive evidence of it.

Evidently the project of an outflanking movement from the north forms part of the scheme of the "Entente Cordiale." If that were not the case, then the plan of fortifying Flushing would not have called forth such an outburst in Paris and London. The reason why they wished that the Scheldt should remain unfortified was hardly concealed by them. Their aim was to be able to transport an English garrison, unhindered, to Antwerp, which means to establish in our country a basis of operation for an offensive in the direction of the Lower Rhine and Westphalia, and then to make us throw our lot in with them which would not be difficult, for, after the surrender of our national center of refuge, we would, through our own fault, renounce every possibility of opposing the demands of our doubtful protectors after having been so unwise as to permit their entrance into our country. Colonel Barnardiston's announcements at the time of the conclusion of the "Entente Cordiale," which were just as perfidious as they were naïve, have shown us plainly the true meaning of things. When it became evident that we would not allow ourselves to be frightened by the pretended danger of the closing of the Scheldt, the plan was not entirely abandoned, but modified in so far as the British army was not to land on the Belgian coast, but at the nearest French harbors.

The revelations of Captain Faber, which were denied as little as the newspaper reports by which they were confirmed or completed in several respects, also testify to this. This British army, at Calais and Dunkirk, would by no means march along our frontier to Longwy in order to reach Germany. It would directly invade Belgium from the northwest. That would give to it the advantage of being able to begin operations immediately, to encounter the Belgian army in a region where we could not depend on any fortress, in case we wanted to risk a battle. Moreover, that would make it possible for it to occupy provinces rich in all kinds of resources and at any rate, to prevent our mobilization or only to permit it after we had formally pledged ourselves to carry on our mobilization to the exclusive advantage of England and her allies.

It is therefore of necessity to prepare a plan of battle for the Belgian army also for that possibility. This is necessary in the interest of our military defense as well as for the sake of the direction of our foreign policy, in case of war between Germany and France.

II. SPEECH OF THE IMPERIAL GERMAN CHANCELLOR, DR. VON BETHMANN HOLLWEG, DELIVERED IN THE REICHSTAG ON DECEMBER 2, 1914.[6]

The Belgian neutrality which England pretended she was bound to shield, is but a mask. On the 2d of August, 7 P. M., we informed Brussels that France's plan of

[6] This is the speech of the Imperial Chancellor referred to by Professor Neumeyer and contained in the copy of the *Münchner Neueste Nachrichten* of December 3, 1914, which he was good enough to send. The passage printed is the one which Professor

campaign was known to us and that it compelled us, for reasons of self-preservation, to march through Belgium, but as early as the afternoon of the same day, August 2d, that is to say, before anything was known and could be known of this step, the British Government promised unconditional aid to France in case the German navy attacked the French coastline. Not a word was said of Belgian neutrality. This fact is established by the declaration made by Sir Edward Grey in the House of Commons on the 3d of August. The declaration was communicated to me on August 4th, but not in full, because of the difficulties experienced at that time in the transmission of telegrams. Besides the very Blue Book issued by the British Government confirms that fact. How then can England allege that she drew the sword because we violated Belgian neutrality? How could British statesmen, who accurately knew the past, talk at all of Belgian neutrality? When on the 4th of August I referred to the wrong which we were doing in marching through Belgium, it was not yet known for certain whether the Brussels Government in the hour of need would not decide after all to spare the country and to retire to Antwerp under protest. You remember that, after the occupation of Liège, at the request of our army leaders, I repeated the offer to the Belgian Government. For military reasons it was absolutely imperative that at the time, about the fourth of August, the possibility for such a development was being kept open. Even then the guilt of the Belgian Government was apparent from many a sign, although I had not yet any positive documentary proofs at my disposal. But the English statesmen were perfectly familiar with these proofs. The documents which in the meantime have been found in Brussels, and which have been given publicity by me, prove and establish in what way and to what degree Belgium has surrendered her neutrality to England. The whole world is now acquainted with two outstanding facts. (1) In the night from the 3d to the 4th of August, when our troops entered Belgian territory, they were not on neutral soil, but on the soil of a state that had long abandoned its neutrality. (2) England has declared war on us, not for the sake of Belgian neutrality, which she herself had helped to undermine, but because she believed that she could overcome and master us with the help of two great military Powers on the Continent. Ever since the 2d of August when England promised to back up the French in this war, she was no longer neutral, but actually in a state of war with us. On the 4th of August she declared war, the alleged reason being our violation of Belgian neutrality. But that was only a sham motive and a spectacular scene intended to conceal the true war motive and thus to mislead both the English people and foreign neutral countries.

The military plans which England and Belgium had worked out to the minutest details now being unveiled, the policy of English statesmen is branded for all times of history to come. * * *

Neumeyer marked with his own hand in the copy sent to the Editor-in-chief of the JOURNAL. The translation is that contained in *Documents Regarding the European War, Series No. IV, International Conciliation, January*, 1915, No. 86.

III. INTERVIEW OF THE IMPERIAL GERMAN CHANCELLOR, DR. VON BETHMANN HOLLWEG, GIVEN TO A REPRESENTATIVE OF THE ASSOCIATED PRESS ON JANUARY 24, 1915, AND PUBLISHED IN AMERICAN PAPERS ON JANUARY 25, 1915.[7]

I am surprised to learn that my phrase, "a scrap of paper," which I used in my last conversation with the British Ambassador in reference to the Belgian neutrality treaty, should have caused such an unfavorable impression in the United States. The expression was used in quite another connection and the meaning implied in Sir Edward Goschen's report and the turn given to it in the biased comment of our enemies are undoubtedly responsible for this impression.

My conversation with Sir Edward Goschen occurred Aug. 4. I had just declared in the Reichstag that only dire necessity and only the struggle for existence compelled Germany to march through Belgium, but that Germany was ready to make compensation for the wrong committed.

When I spoke I already had certain indications, but no absolute proof upon which to base a public accusation, that Belgium long before had abandoned its neutrality in its relations with England. Nevertheless, I took Germany's responsibilities toward the neutral state so seriously that I spoke frankly of the wrong committed by Germany.

What was the British attitude on the same question? The day before my conversation with Ambassador Goschen, Sir Edward Grey had delivered his well-known speech in Parliament, in which, while he had not stated expressly that England would take part in the war, he had left the matter in little doubt.

One needs only to read this speech through carefully to learn the reason for England's intervention in the war. Amid all his beautiful phrases about England's honor and England's obligations we find it over and over again expressed that England's interests—its own interests—call for participation in the war, for it is not in England's interests that a victorious and therefore stronger Germany should emerge from the war.

This old principle of England's policy—to take as the sole criterion of its actions its private interests regardless of right, reason, or considerations of humanity—is expressed in that speech of Gladstone's in 1870 on Belgian neutrality, from which Sir Edward quoted.

Mr. Gladstone then declared that he was unable to subscribe to the doctrine that the simple fact of the existence of a guarantee is binding on every party thereto, irrespective altogether of the particular position in which it may find itself at a time when the occasion for action on the guarantee arrives; and he referred to such English statesmen as Aberdeen and Palmerston as supporters of his views.

England drew the sword only because it believed its own interests demanded it. Just for Belgian neutrality it would never have entered the war.

That is what I meant when I told Sir Edward Goschen in that last interview, when we sat down to talk the matter over privately as man to man, that among the reasons

[7] The interview is reprinted from the *New York Times Current History*, Vol. 1, No. 6, pages 1120–1122. Only so much of the interview is given as refers to the violation of Belgian neutrality.

which had impelled England to go into the war the Belgian neutrality treaty had for her only the value of a scrap of paper.

I may have been a bit excited and aroused. Who would not have been at seeing the hopes and the work of the whole period of my Chancellorship going for naught? I recalled to the Ambassador my efforts for years to bring about an understanding between England and Germany; an understanding which, I reminded him, would have made a general European war impossible, and which absolutely would have guaranteed the peace of Europe. * * *

In comparison with such momentous consequences was the treaty not a scrap of paper? England ought really to cease harping on this theme of Belgian neutrality. Documents on the Anglo-Belgian military agreement which we have found in the meantime show plainly enough how England regarded this neutrality. As you know, we found in the archives of the Belgian Foreign Office documents which showed that England in 1911 was determined to throw troops into Belgium without the assent of the Belgian Government if war had then broken out—in other words, to do exactly the same thing for which, with all the pathos of virtuous indignation, it now reproaches Germany.

In some later dispatch Sir Edward Grey, I believe, informed Belgium that he did not believe England would take such a step because he did not think English public opinion would justify that action. And still people in the United States wonder that I characterized as a scrap of paper the treaty whose observance, according to responsible British statesmen, should be dependent on the pleasure of British public opinion—a treaty which England itself had long since undermined with its military agreements with Belgium!

Remember, too, that Sir Edward Grey expressly refused to assure us of England's neutrality even in the event that Germany respected Belgian neutrality.

I can understand, therefore, the English displeasure at my characterization of the treaty of 1839 as a scrap of paper, for this scrap of paper was for England extremely valuable, furnishing an excuse before the world for embarking in the war.

I hope, however, that in the United States you will see clearly enough that England in this matter, too, acted solely on the principle of "right or wrong, my interest."

IV. STATEMENT OF SIR EDWARD GREY, BRITISH SECRETARY OF STATE FOR FOREIGN AFFAIRS, DATED JANUARY 26, 1915, IN REPLY TO DR. VON BETHMANN HOLLWEG'S INTERVIEW GIVEN TO A REPRESENTATIVE OF THE ASSOCIATED PRESS ON JANUARY 25, 1915. [8]

The Secretary of State for Foreign Affairs authorizes the publication of the following observations upon the report of an interview recently granted by the German Chancellor to an American correspondent. It is not surprising that the German Chancellor should show anxiety to explain away his now historic phrase about a treaty being a mere "scrap of paper."

The phrase has made a deep impression because the progress of the world largely

[8] Reprinted from the *New York Times Current History*, Vol. 1, No. 6, pages 1122–1124. Only the portion of Sir Edward Grey's statement relating to the violation of Belgian neutrality is printed above.

depends upon the sanctity of agreements between individuals and between nations, and the policy disclosed in Herr von Bethmann Hollweg's phrase tends to debase the legal and moral currency of civilization.

What the German Chancellor said was that Great Britain in requiring Germany to respect the neutrality of Belgium "was going to make war just for a word, just for a scrap of paper"—that is, that Great Britain was making a mountain out of a molehill. He now asks the American public to believe that he meant the exact opposite of what he said; that it was Great Britain who really regarded the neutrality of Belgium as a mere trifle, and that it was Germany who "took her responsibilities toward the neutral states so seriously."

The arguments by which Herr von Bethmann-Hollweg seeks to establish the two sides of this case are in flat contradiction of the plain facts.

First, the German Chancellor alleges that "England in 1911 was determined to throw troops into Belgium without the assent of the Belgian Government." This allegation is absolutely false. It is based upon certain documents found in Brussels which record conversations between British and Belgian officers in 1906, and again in 1911.

The fact that there is no note of these conversations at the British War Office or the Foreign Office shows that they were of a purely informal character and that no military agreement of any sort was at either time made between the two Governments. Before any conversations took place between the British and Belgian officers it was expressly laid down on the British side that discussion of the military possibilities was to be addressed to the manner in which, in case of need, British assistance could be most effectually afforded to Belgium for the defense of her neutrality, and on the Belgian side a marginal note upon the record explains that "the entry of the English into Belgium would only take place after the violation of our (Belgium's) neutrality by Germany."

As regards the conversation of 1911, the Belgian officer said to the British officer: "You could only land in our country with our consent"; and in 1913 Sir Edward Grey gave the Belgian Government a categorical assurance that no British Government would violate the neutrality of Belgium and that "so long as it was not violated by any other Power we should certainly not send troops ourselves into their territory."

The Chancellor's method of misusing documents may be illustrated in this connection. He represents Sir Edward Grey as saying, "he did not believe England would take such a step because he did not think English public opinion would justify such action."

What Sir Edward Grey actually wrote was: "I said that I was sure that this Government would not be the first to violate the neutrality of Belgium, and I did not believe that any British Government would be the first to do so, nor would public opinion here ever approve of it."

If the German Chancellor wishes to know why there were conversations on military subjects between British and Belgian officers he may find one reason in a fact well known to him—namely, that Germany was establishing an elaborate network of strategical railways leading from the Rhine to the Belgian frontier through a barren, thinly populated tract. The railways were deliberately constructed to permit of a sudden attack upon Belgium, such as was carried out in August last.

This fact alone was enough to justify any communications between Belgium and the other Powers on the footing that there would be no violation of Belgian neutrality, unless it was previously violated by another Power. On no other footing did Belgium ever have any such communications.

In spite of these facts the German Chancellor speaks of Belgium as having thereby "abandoned and forfeited" her neutrality, and he implies that he would not have spoken of the German invasion as a "wrong" had he then known of the conversations of 1906 and 1911.

It would seem to follow that according to Herr von Bethmann Hollweg's code, wrong becomes right if the party which is to be the subject of the wrong foresees the possibility and makes preparations to resist it.

Those who are content with older and more generally accepted standards are likely to agree rather with what Cardinal Mercier said in his pastoral letter: "Belgium was bound in honor to defend her own independence. She kept her oath. The other Powers were bound to respect and to protect her neutrality. Germany violated her oath. England kept hers. These are the facts."

In the second part of the German Chancellor's thesis, namely, that Germany "took her responsibilities toward the neutral states seriously," he alleges nothing except that "he spoke frankly of the wrong committed by Germany in invading Belgium."

That a man knows the right while doing the wrong is not usually accepted as proof of his serious conscientiousness. The real nature of Germany's view of her "responsibilities toward the neutral states" may, however, be learned on authority which cannot be disputed by reference to the English "White Paper."

If those responsibilities were in truth taken seriously why, when Germany was asked to respect the neutrality of Belgium if it were respected by France, did Germany refuse? France, when asked the corresponding question at the same time, agreed. This would have guaranteed Germany from all danger of attack through Belgium.

The reason of Germany's refusal was given by Herr von Bethmann Hollweg's colleague (the German Foreign Secretary, Herr von Jagow). It may be paraphrased in the well-known gloss upon Shakespeare: "Thrice is he armed that hath his quarrel just, but four times he that gets his blow in fust."

"They had to advance into France," said Herr von Jagow, "by the quickest and easiest way so as to be able to get well ahead with their operations and endeavor to strike some decisive blow as early as possible."

Germany's real attitude toward Belgium was thus frankly given by the German Foreign Secretary to the British Ambassador, and the German Chancellor in his speech to the Reichstag claimed the right to commit a wrong in virtue of the military necessity of hacking his way through. The treaty which forbade the wrong was by comparison a mere scrap of paper.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Vie Int.*, La Vie Internationale, Brussels; *Arch. dipl.*, Archives Diplomatiques, Paris; B., boletin, bulletin, bolletino; *P. A. U.*, bulletin of the Pan-American Union, Washington; *Clunet*, J. de Dr. Int. Privé, Paris; *Doc. dipl.*, France, Documents diplomatiques; *B. Rel. Ext.*, Boletin de Relaciones Exteriores, *Dr.*, droit, diritto, derecho; *D. O.*, Diaroi Oficial; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Cd.*, Great Britain, Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *L.*, Law; *L'Int. Sc.*, L'Internationalism Scientifique, The Hague; *M.*, Magazine; *Mem. dipl.*, Memorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *Martens*, Nouveau recueil générale de traités, Leipzig; *Q. dip.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, revista; *Reichs G.*, Reichs-Gesetzblatt, Berlin; *Staats.*, Staatsblad, Netherlands; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, The Times (London).

August, 1914.

20 EUROPEAN WAR. GREAT BRITAIN. Order in Council announcing that Great Britain, France and Russia will observe the provisions of the Declaration of London, with certain modifications as regards contraband of war. *London Gazette*, No. 28879.

25 EUROPEAN WAR. FRANCE. Decree announcing that provisions of the Declaration of London will be followed in present hostilities, with modifications adopted by Great Britain. *J. O.*, Aug. 26, 1914; *London Gazette*, No. 28879.

September, 1914.

14 EUROPEAN WAR. RUSSIA. Under Imperial Ukase Russia announced that the provisions of the Declaration of London will be observed by Russia during the present war, subject to the modifications adopted by the British and French Governments as declared in the British Order in Council of August 20, 1914, and the French Decree of August 25, 1914. *London Gazette*, No. 28918.

21 EUROPEAN WAR. GREAT BRITAIN. Proclamation adding to the list of contraband of war. *London Gazette*, No. 28910.

November, 1914.

6 EUROPEAN WAR. FRANCE. Decree relative to the application of the rules of international maritime law to the present war. *J. O.*, Nov. 7, 1914.

December, 1914.

7 FRANCE—UNITED STATES. French decree approving parcel post convention between French Guiana and the United States, signed August 21, 1914. *J. O.*, Dec. 14, 1914.

8–21 EUROPEAN WAR. RUSSIA. Official Bulletin of the Laws published Imperial Ukase dated December 8/21, revising the decree of September 1/14, 1914, concerning the application of the regulations of naval warfare as drawn up by the Declaration of London. English text: *London Gazette*, No. 29159.

23 EUROPEAN WAR. GREAT BRITAIN. Proclamation adding to the list of contraband of war. *London Gazette*, No. 29016.

March, 1915.

11 EUROPEAN WAR. GREAT BRITAIN. Order in Council signed for prevention of commercial intercourse with Germany, in retaliation for the German Admiralty proclamation declaring a war zone of the waters around the British Islands. This Order was announced as forthcoming in Parliament on March 1st; it was signed March 11th, and published March 16th. All intercourse is forbidden, but neutrals will be reimbursed for legitimate losses sustained. *London Gazette*, No. 29102; *N. Y. Times*, March 12, 1915.

22 RUSSIA—UNITED STATES. Ratifications exchanged of treaty for the advancement of peace, signed Oct. 1/Sept. 18, 1914. English and French texts: *U. S. Treaty Series*, No. 616.

26 EUROPEAN WAR. CHILE—GREAT BRITAIN—GERMANY. Chile made representations to Great Britain regarding the sinking of the German cruiser *Dresden* on March 16th. Chile claims that the *Dresden* was blown up by her own crew in Chilean waters after bombardment by the British squadron and when the Chilean Government was on the point of interning her. On April 15th, a British White Paper announced that full and ample apology had been made to Chile by Great Britain for the violation of Chilean neutrality. *N. Y. Times*, April 16, 1915; *Cd.*, 7859.

March, 1915.

27 GREAT BRITAIN. Notice to mariners [No. 239, 1915], relating to mined areas in the North Sea, River Thames and English Channel, with information as to compulsory pilotage. *London Gazette*, No. 29116.

28 EUROPEAN WAR. UNITED STATES. An American, Leon C. Thrasher, was among the passengers lost on the English steamer *Falaba*, sunk by a German submarine. On May 13th, the United States protested to Germany against the dangers to which Americans were subjected in the submarine operations of Germany. On May 28th, Germany replied, stating that the *Falaba* was sunk after her commander had refused to heed the warning of the submarine and had continued to signal for assistance. Texts in *Official documents in Special Supplement to this* JOURNAL.

April, 1915.

3 EUROPEAN WAR. GERMANY—UNITED STATES. The United States presented a note to the German Government demanding payment by Germany of $228,059.54, with interest from January 28th, for the destruction of the American sailing vessel *William P. Frye* by the German converted cruiser *Prince Eitel Friedrich*. On April 5th, Germany replied consenting to pay the required sum and basing this upon the treaties of 1799 and 1828 between Prussia and the United States, but claiming justification for the sinking of the ship and destruction of the cargo under international law, and proposing that the vessel go before the German Prize court for adjudication. On April 28th, the United States answered, accepting the offer to pay for the ship upon the basis of the violation of the treaties, but declining to agree to submit the case to the prize court. Texts in *Official documents in Special Supplement to this* JOURNAL.

4 EUROPEAN WAR. GERMANY—UNITED STATES. The German Ambassador handed a note to the Department of State of the United States charging in effect that the United States is violating the true spirit of neutrality by permitting large quantities of arms to be shipped to England, France and Russia, and characterizing as a failure the diplomatic efforts of the United States to effect shipment of food supplies to Germany. The memorandum intimates that the United States maintained the true spirit of

April, 1915.

neutrality to Mexico in placing an embargo on the export of arms to Huerta and Carranza, and quotes a statement of President Wilson on the Mexican situation. The United States replied to the note on April 21st. Texts of notes in *Official documents in Special Supplement to this* JOURNAL.

7 EUROPEAN WAR. GERMANY. German converted cruiser *Eitel Friedrich*, which came into Newport News, Va., March 10, 1915, was interned by the United States at the request of her commander. *N. Y. Times*, April 8, 1915.

11 EUROPEAN WAR. GERMANY. German auxiliary cruiser *Kronprinz Wilhelm* came into Newport News, Va. The captain reported that his ship had sunk fourteen ships of the Allies and one Norwegian ship. The ship was interned April 26th. *N. Y. Times*, April 12, 27, 1915.

12 UNITED STATES—GREAT BRITAIN. The Department of State of the United States announced that Great Britain will requisition the cargo of the *Wilhelmina* and reimburse her owners for the delay. *R. of R.* (N. Y.), *51*:538.

14 EUROPEAN WAR. GREAT BRITAIN. Proclamation amending Defense of the Realm Act of November 28, 1914, and March 23, 1915, giving the Admiralty authority to impose restrictions on persons proceeding to or from ports of Great Britain, and relating to trial by court-martial and civil jury. *London Gazette*, No. 29129.

18 EUROPEAN WAR. GERMANY. Ordinance relative to amendments to the Prize Ordinance of Sept. 30, 1909, and its supplements dated Oct. 18, Nov. 23, and Dec. 14, 1914. English text: *London Gazette*, No. 29159. German text: *R. Gesetzblatt*, No. 49, 1915.

21 EUROPEAN WAR. GERMANY—UNITED STATES. The United States answered the note of the German Ambassador of April 4th, relating to American neutrality, the shipment of arms, etc. Text of notes in *Official documents in Special Supplement, to this* JOURNAL.

23 EUROPEAN WAR. GREAT BRITAIN. Blockade declared, beginning at midnight, of Kamerun, German West Africa. *London Gazette.*

26 EUROPEAN WAR. GERMANY. German auxiliary cruiser *Kronprinz*

April, 1915.

Wilhelm interned at Newport News, Va. *N. Y. Times*, April 27, 1915.

28 EUROPEAN WAR. UNITED STATES. American steamer *Cushing* slightly damaged by a bomb dropped from a German aeroplane in the North Sea. *New York Times*, April 29, 1915.

28 EUROPEAN WAR. GERMANY—UNITED STATES. The United States sent a note to Germany accepting the offer of Germany to pay for the destruction of the American sailing vessel *William P. Frye* on the ground of the violation of existing treaties between the United States and Germany, but not on the ground that the destruction was justified by existing rules of international law. Protest was also made against the case going before the German prize court. Text of note in *Official documents in Special Supplement to this* JOURNAL.

May, 1915.

1 EUROPEAN WAR. UNITED STATES. American steamer *Gulflight*, bound for a French port, was sunk by a German submarine off the Scilly Islands, with a loss of three lives. *New York Times*, May 2, 1915.

1 EUROPEAN WAR. GERMANY. The Imperial German Embassy to the United States addressed a communication to the American people, in paid advertisements in various American newspapers, warning them of the danger of travelling in English ships. *N. Y. Times*, May 1; *N. Y. Sun*, May 1, 1915.

4 TRIPLE ALLIANCE. Italy denounced the Triple Alliance with Austria and Germany. *N. Y. Times*, May 5, 1915.

7 EUROPEAN WAR. The Cunard steamer *Lusitania* was torpedoed and sunk without warning, by a German submarine, off the southern coast of Ireland, near Kinsale; 1150 persons lost their lives, including more than 100 Americans. *New York Times*, May 8, 1915.

8 EUROPEAN WAR. BELGIUM. Germany posted proclamations in Antwerp dated May 5, 1915, announcing that Germany had formally annexed Belgium. *N. Y. Times*, May 8, 1915.

9 CHINA—JAPAN. Announced that China has accepted the demands contained in the Japanese ultimatum. *N. Y. Times*, May 10, 1915.

May, 1915.

13–15 EUROPEAN WAR. GERMANY—UNITED STATES. The United States presented a note to Germany, protesting against the submarine policy of Germany in the present war, and calling attention to the case of Leon Thrasher, who lost his life when the *Falaba* was torpedoed, to the dropping of bombs on the American steamer *Cushing*, to the torpedoing of the American steamer *Gulflight*, and culminating in the sinking of the *Lusitania*, with many American passengers aboard; the note stated that the United States expected Germany to disavow such acts and to take steps to prevent their recurrence, and declared that the United States will not be expected to omit any word or act necessary to maintain the rights of its citizens. Text in *Official documents in Special Supplement to this* JOURNAL.

20 LAKE MOHONK CONFERENCE ON INTERNATIONAL ARBITRATION. The Twentieth Annual Convention of the Lake Mohonk Conference on International Arbitration met at Mohonk Lake, N. Y. *N. Y. Times*, May 21, 1915.

23 EUROPEAN WAR. Italy declared war on Austria to date from "tomorrow." *N. Y. Times*, May 24, 1915.

24–29 PAN AMERICAN FINANCIAL CONGRESS met in Washington, D. C. *P. A. U.*, *40*:569.

24 EUROPEAN WAR. Germany declared that a state of war exists with Italy. *N. Y. Times*, May 25, 1915.

24 EUROPEAN WAR. UNITED STATES. Neutrality proclamation issued covering the entry of Italy into the war. *N. Y. Times*, May 26, 1915.

25 ARGENTINE REPUBLIC—BRAZIL—CHILE. Treaty for the advancement of peace following the plan of the Secretary of State of the United States William Jennings Bryan. *Washington Post*, May 26, 1915.

25 CHINA—JAPAN. Treaty signed respecting South Manchuria and Eastern Inner Mongolia. *R. de droit int. dipl.* (Japanese text), June, 1915.

25 CHINA—JAPAN. Treaty signed respecting the providence of Shantung. *R. de droit int. et dipl.* (Japanese text), June, 1915.

25 EUROPEAN WAR. Italy addressed a note to the neutral Powers explaining her reasons for going to war with Austria. Text of note: *N. Y. Times*, May 26, 1915.

May, 1915.

27 EUROPEAN WAR. GREAT BRITAIN. Proclamation making further additions and amendments to the list of articles to be treated as contraband of war. *London Gazette*, Nos. 29173, 29175.

28 EUROPEAN WAR. GERMANY—UNITED STATES. Germany sent a reply to the American note of May 13 in regard to the case of the *Falaba*, the *Cushing*, the *Gulflight* and the *Lusitania*. Concerning the sinking of the English ship *Falaba*, Germany alleged that the captain failed to heed the warning of the submarine to halt, but continued to signal for help; in regard to the *Cushing* and *Gulflight* that an investigation was under way by the German Government, but that Germany was willing to submit the question to a commission of inquiry as provided by Title III of the Convention for the Peaceful Settlement of International Disputes signed at The Hague, October 18, 1907; in regard to the *Lusitania*, Germany claimed to be within her rights in sinking the ship, as an armed auxiliary ship of the British navy, that the cargo of ammunition was partly responsible for her total and speedy destruction, and that neutrals had been sufficiently warned not to enter the blockaded zone in ships of the Allies. Text in *Official documents in Special Supplement to this* JOURNAL.

29 PORTUGAL. Theophile Braga elected President of Portugal by the National Assembly, succeeding Manuel de Arriago, resigned. *N. Y. Times*, May 30, 1915.

June, 1915.

1 UNITED STATES—NORWAY—DENMARK. Under treaties for the advancement of peace, the President of the United States appointed Dr. James Brown Scott Commissioner for Denmark, and Hon. Judson Harmon, Commissioner for Norway.

2 MEXICO—UNITED STATES. The United States presented a note to the warring factions in Mexico calling upon the leaders speedily to come to an agreement in internal affairs in Mexico. In case of failure, warning is given that the United States will proceed to take such steps as may be necessary to bring about order in Mexico. *N. Y. Times*, June 3, 1915.

3 EUROPEAN WAR. The Republic of San Marino declared war on Austria. San Marino is not a protectorate of Italy but is "pro-

June, 1915.

tected" by Italy. The importance of her entry into the war lies in the fact that her territory may not be used as neutral territory by Austrian aeroplanes for making repairs, etc. *N. Y. Times*, June 4, 1951.

4 EUROPEAN WAR. GERMANY—UNITED STATES. Germany made further reply to the American note of May 13, in regard to the case of the *Cushing* and the *Gulflight*. It is explained that the *Gulflight* was torpedoed by mistake, and indemnity will be paid when ascertained by experts; in the case of the *Cushing*, further evidence is asked, but it is stated that indemnity will be paid for ascertained loss. Text in *Official documents in Special Supplement to this* JOURNAL.

6 RUSSIA—SWEDEN. Announcement made that a treaty was ratified last week mutually acknowledging the financial, commercial and industrial interests of the respective countries. *N. Y. Times*, June 7, 1915.

8 CHINA—RUSSIA. Announcement that a treaty had been signed between the two countries relating to Outer Mongolia. *Washington Star*, June 8, 1915.

8 EUROPEAN WAR. UNITED STATES. Hon. William Jennings Bryan resigned as Secretary of State. He gave as the reason his disagreement with the policy of the administration on the question of the use of submarines in the European war and his unwillingness to sign the note of June 9th to Germany in reply to the German note of May 28th. *N. Y. Times*, June 9, 1915.

9 UNITED STATES. The President appointed Hon. Robert Lansing Secretary of State *ad interim*, for a period of thirty days. Mr. Lansing became Counselor of the Department of State, April 1, 1914. On June 23, Mr. Lansing was appointed Secretary of State. See: *this* JOURNAL, *8*:336.

9 EUROPEAN WAR. GERMANY—UNITED STATES. The United States sent a note to Germany on the subject of the *Falaba*, the *Gulflight*, the *Cushing* and the *Lusitania*. Reiteration is made of the rights of Americans to travel on the high seas, of the positive information of the United States that the *Lusitania* was unarmed, and the hope of the United States that an agreement might be reached whereby the rights of Americans would be safeguarded. Text in *Official documents in Special Supplement to this* JOURNAL.

June, 1915.

10 MEXICO. The Villa-Zapata Government deposed Roque Gonzales Garza as provisional president and elected Francisco Lagos Chazara. *N. Y. Times*, June 11, 1915.

24 EUROPEAN WAR. GERMANY—UNITED STATES. The United States sent a note to Germany asking reconsideration of the German refusal to settle by direct diplomatic negotiation, instead of prize court proceedings, the claim presented on behalf of the captain and owners of the American ship *William P. Frye*, sunk with her cargo of wheat by the *Prinz Eitel Friedrich*. The contention of the United States is that inasmuch as Germany has admitted liability for the sinking of the ship under the treaty of 1828, prize court proceedings are unnecessary and not binding on the United States.

29 EUROPEAN WAR. AUSTRIA-HUNGARY—UNITED STATES. Austria-Hungary delivered note to the American Ambassador on contraband and the neutrality of the United States. English text: *N. Y. Times*, Aug. 2, 1915.

KATHRYN SELLERS.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

GREAT BRITAIN [1]

Alien enemies. Return of the number of, not including prisoners of war, interned on Nov. 1, 1914, and the number released during November, December and January, respectively. (H. L. Paper No. 41, Sess. 1914–15.) 1d.

Aliens Restriction Amendment Order, 1915. (St. R. & O. 1915, No. 301.) 1½d.

Arbitration convention with Switzerland, signed at London, June 10. 1914. (Treaty series, 1915, No. 3.) 1d.

Belgian refugees, Minutes of evidence of Departmental Committee on the reception and employment of in Great Britain. With index. 2s 2d. (Cd. 7779.)

Belgium. Protest by Belgian Government against German allegation that Belgium had forfeited her neutrality before the outbreak of war. 1½d.

———. Reports of the commission of enquiry into the violation of international law. 9th, 10th, 11th and 12th. 1½d. each.

Belligerent rights, Correspondence with United States Government respecting. (Cd. 7816.) 4d.

British and Foreign State Papers. Vol. 103. 1909–1910. 10s. 6d.

British Ships Transfer Restriction Act, 1914–1915. (5 Geo. V, Ch. 21.) 1d.

Commissions and committees on questions arising out of the war, List of. (Cd. 7855.) 1d.

Contraband of War. Proclamation specifying certain additional articles to be treated as. March 11, 1915. (St. R. & O. 1915, No. 205.) 1½d.

Copyright. Order in Council further amending the Order in Council of June 24, 1912, regulating copyright relations with the foreign countries of the Berne Copyright Union as regards Italy. (St. R. & O. 1915, No. 257.) 1½d.

[1] Official publications of Great Britain and many of the British colonies may be purchased of Wyman & Sons, Ltd., Fetter Lane, E. C., London, England.

———. Order in Council regulating copyright relations with United States of America. Feb. 3, 1915. (St. R. & O. 1915, No. 130.) 1½d.

Customs. Proclamation prohibiting exportation of certain warlike stores, provisions, victuals and other articles. Feb. 3, 1915. (St. R. & O. 1915, No. 60.) 1d.

———. Order in Council, March 2, 1915, varying above proclamation. (St. R. & O. 1915, No. 159.) 1½d.

———. Order in Council, March 18, 1915, further varying above proclamation. (St. R. & O. 1915, No. 225.) 1½d.

———. Order in Council, April 15, 1915, further varying above proclamation. (St. R. & O. 1915, No. 348.) 1½d.

———. Order in Council, April 21, 1915, further varying above proclamation. (St. R. & O. 1915, No. 355.) 1½d.

Customs War Powers Act, 1914–1915. (5 Geo. V, Ch. 31.) 1d.

Defence of the Realm (Amendment) Act, 1914–1915. (5 Geo. V, Ch. 34.) 1d.

———. No. 2. (5 Geo. V, Ch. 37.) 1d.

———. Order in Council amending the regulations of 1914. (St. R. & O. 1915, No. 235.) 1½d.

———. Order in Council further amending the regulations of 1914. April 13, 1915. (St. R. & O. 1915, No. 302.) 1½d.

Dresden, German cruiser. Notes exchanged with Chilean minister respecting the sinking of, in Chilean territorial waters. (Cd. 7859.) 1d.

European crisis, Letter of July 31, 1914. from President of France to King of England, respecting, and reply of August 1, 1914. (Cd. 7812.) 1d.

———. Roumanian translation of correspondence of the British Government. 1s.

Exchange of prisoners of war, interned civilians, diplomatic and consular officers, in the United Kingdom and Germany respectively, Correspondence with the United States Ambassador respecting. (Cd. 7857.) 9½d.

Extradition. Order in Council directing that "The Extradition Ordinance (Ashanti), 1914," shall have effect in Ashanti as if it were part of the Extradition Act, 1870. Feb. 10, 1915. (St. R. & O. 1915, No. 145.) 1½d.

German prisoners of war and interned civilians in Great Britain, Correspondence with United States Ambassador regarding. (Cd. 7815.) 1½d.

Government war obligations, Bill to make provision with respect to. (H. L. Bill No. 24, Sess. 1914–15.) 1d.

International Opium Conference, Third, held at The Hague, June, 1914, Correspondence respecting the. (Cd. 7813.) 3½d.

Legal Proceedings against Enemies Act, 1914–1915. (5 Geo. V, Ch. 36.) 1½d.

———. Rules under above act, March 16, 1915. (St. R. & O. 1915, No. 232.) 1½d.

Naturalization. Return showing the names of all aliens to whom certificates of naturalization have been issued during 1914. (H. C. Rept. No. 156, sess. 1914–15.) 5d.

Prisoners of war and interned civilians in Great Britain and Germany respectively, Correspondence with United States Ambassador respecting treatment of. (Cd. 7817.) 1s.

Prize bounty. Order in Council declaring the intention to grant, to officers and crews of ships of war. March 2, 1915. (St. R. & O. 1915, No. 226.) 1½d.

Prize Court Rules, 1914, Order in Council amending. Feb. 3, 1915. (St. R. & O. 1915, No. 135.) 1½d.

Prize courts (Turkey). Order in Council, Feb. 3, 1915, authorizing the commissioners for executing the office of Lord High Admiral, to require the constitution of prize courts. (St. R. & O. 1915, No. 136.) 1½d.

Prizes captured during European war, Accession of Russia to convention of November 9, 1914, between Great Britain and France, relating to. Signed at London, March 5, 1915. (Treaty series, 1915, No. 4.) 1d.

Reprisals. Order in Council framing reprisals for restricting further the commerce of Germany. March 11, 1915. (St. R. & O. 1915, No. 206.) 1½d.

State papers and manuscripts relating to English affairs existing in the archives and collections of Venice, and in other libraries of northern Italy. Vol. XX, 1626–1628. 15s. 7d.

Togoland, Correspondence relating to military operations in. (Cd. 7872.) 7d.

Trading with the enemy. County courts rules, Feb. 15, 1915. (St. R. & O. 1915, No. 115.) 1½d.

———. Rules made by the Lord Chancellor of Ireland. February 4, 1915. (St. R. & O. 1915, No. 254.) 1½d.

———. Proclamation respecting occupied territory. Feb. 16, 1915. (St. R. & O. 1915, No. 140.) 1½d.

Treaty series, 1914. No. 20. Index. (Cd. 7740.) 1d.

Union of South Africa, Correspondence respecting proposed naval and military expedition against German South-West Africa. (Cd. 7873.) 1d.

———. Outbreak of rebellion in and policy of government with regard to suppression of, Report on, with appendices. (Cd. 7874.) 10d.

War risk insurance scheme. Text of agreements between the Government and the war risk insurance associations. (Cd. 7838.) 4d.

UNITED STATES [2]

Army. Hearings on increase of. Jan. 4, 1915. 37 p. *Military Aff. Comm.*

China. Act to regulate practice of pharmacy and sale of poison in consular districts of United States in. March 3, 1915. (Pub. No. 262.) *State Dept.*

Chinese in United States. Hearings pursuant to H. 20037 further to regulate entrance of Chinese aliens into United States. 1915. 78 p. *Immigration and Naturalization Committee.*

Coast defense, Answers to questions propounded in H. R. 698 adopted by House of Representatives Jan. 14, 1915. Jan. 16, 1915. 2 p. (H. doc. 1492.) *War dept.*

Continental Congress, Journals of, 1774–89. Vols. 22 and 23. Cloth, $1.00 each.

Contraband of war, Response of Secretary of State to resolution relating to shipment of naval stores abroad and communications from foreign governments relating thereto, stating that it is not compatible with public interests to furnish papers asked for. Feb. 2, 1915. (S. doc. 799.) *State Dept.*

Copper. Same as above. (S. doc. 798.) *State Dept.*

Copyright. Proclamation extending benefits of Sec. 1 (e) of Act of March 4, 1909, to subjects of Great Britain and dominions, with certain exceptions. Jan. 1, 1915. 2 p. (No. 1289.) *State Dept.*

Dacia, Steamship. Statement of motives and facts concerning purchase of. 19 p. (S. doc. 979.) Paper, 5c.

[2] When prices are given, the document in question may be obtained for the amount noted from the Superintendent of Documents, Government Printing Office, Washington, D. C.

Diplomatic and consular appropriation bill, Hearings on. Dec. 17–22, 1914. 99 p. Same, Jan. 12, 1915, 29 p. *For. Aff. Comm.*

———. Report submitting. Jan. 26, 1915. 14 p. (H. rp. 1324.) *For. Aff. Comm.*

———. Hearings before subcommittee on appropriations. 47 p. *Appropriations Comm.*

———. Report amending. Feb. 24, 1915. 3 p. (S. rp. 1024.) *Appropriations Comm.*

———. Act making appropriations for fiscal year 1916. March 4, 1915. 14 p. (Pub. No. 294.) *State Dept.*

Diplomatic and consular service. Act for improvement of. Feb. 5, 1915. 3 p. (Pub. No. 242.) *State Dept.*

Dominican Customs Receivership. Seventh annual report of General Receiver, August 1, 1913–July 31, 1914. Oct. 1, 1914. 48 p. Paper, 5c.

Embargoes. Austro-Hungarian embargo on exports, Dec. 15, 1914; French embargo on exports, 1914, and Jan. 6, 1915; German decrees prohibiting exportation and transit on account of war, corrected to Sept. 19, 1914; same corrected to Oct. 23, 1914; list of articles embargoed by neutral European countries, Dec. 15, 1914; prohibition affecting exports and imports in United Kingdom, 1914; Russian embargo on Exports, Dec. 18, 1914. *State Dept.*

Europe. List of references on Europe and international politics in relation to present issues. 1914. 144 p. Paper, 15c.

Finance. Report favoring S. J. R. 228 authorizing President to extend invitations to Central and South American governments to be represented at conference in Washington, D. C., in 1915 looking to improvement of financial relations between the United States and those nations. Jan. 20, 1915. 3 p. (S. rp. 920.) *Foreign Relations Committee.*

———. Report favoring H. J. R. 409 for same purpose. Feb. 19, 1915. 2 p. (H. rp. 1421.) *Foreign Affairs Committee.*

Firearms, Further response to resolution. Memorandum showing exports of from United States to specified countries during November, 1914. Jan. 18, 1915. 2 p. (S. doc. 660, pt. 2.) *Commerce Dept.*

Foreign relations of United States. List of government publications concerning, sold by Superintendent of Documents. Jan. 1915. 42 p. (Price list 65.) *Government Printing Office.*

———. Papers relating to, with annual message of President, Dec. 6, 1910. 1915. 884 p. Cloth, 65c.

———. Same. (H. doc. 1000, 61st Cong. 3d sess.)

Fur seals in Alaska, Hearings on act to protect. Jan. 18, 19, 1915. 61 p. *Ways and Means Committee.*

Immigration. Annual report of Commissioner General of Immigration, fiscal year 1914. 408 p. 2 pl. Paper, 30c.

———. Panama-Pacific International Exposition, statistics of immigration, fiscal year 1914. 132 p. *Immigration Bureau.*

Immigration laws and rules of Nov. 15, 1911. 5th ed. 69 p. *Immigration Bureau.*

Immigration and emigration. Message from President of United States vetoing bill to regulate. Jan. 28, 1915. 25 p. (H. doc. 1527.) Paper, 5c.

———. Report favoring passage over veto of bill to regulate. Feb. 5, 1915. 3 p. (H. rp. 1368.) *Immigration and Naturalization Committee.*

International arbitration, Letter on from Oscar T. Crosby. 10 p. (S. doc. 987.) Paper, 5c.

International Congress on Education, Report favoring H. J. R. 273 requesting President to invite foreign governments to participate in, at Oakland, Cal., Aug. 16–27, 1915. 2 p. (H. rp. 825, 63d Cong. 2d sess.) *For. Aff. Comm.*

International Joint Commission on Boundary Waters between United States and Canada, Hearings in re remedies for pollution of boundary waters. Sept. 25–Oct. 2, Nov. 10 and 11, Dec. 14 and 16, 1914. 330 p. *State Dept.*

Latin-American Trade Committee appointed by Secretary of Commerce, report of. Jan. 19, 1915. 13 p. (S. doc. 714.) Paper, 5c.

Mediation between United States and Mexico, S. J. R. 191 to convey appreciation of Congress to Domicio da Gama, Romulo S. Naon, and Eduardo Suarez for their services in. March 4, 1915. (Pub. No. 75.) *State Dept.*

Merchant marine. Address of Secretary of the Treasury on the administration and the shipping bill, before Chamber of Commerce of United States, Washington, D. C., Feb. 4, 1915. 23 p. (S. doc. 950.) Paper, 5c.

———. Address delivered by Secretary of the Treasury before Commercial Club at Chicago, Ill., Jan. 9, 1915, relative to merits of the shipping bill. 1915. 18 p. (S. doc. 713.) Paper, 5c.

———. Address of Hon. Theodore E. Burton before National Cham-

ber of Commerce, Washington, D. C., Feb. 4, 1915, on the opposition and the shipping bill. 16 p. (S. doc. 949.) Paper, 5c.

———. Debate in Senate of Australia on proposed government-owned steamship lines. 16 p. (S. doc. 968.) *Senate.*

———. Hearings on H. 18518 for government ownership and operation of merchant vessels in foreign trade of United States. 1914. 51 p. *Merchant Marine and Fisheries Committee.*

———. Hearings pursuant to S. R. 543 to ascertain information concerning interned ships in ports of United States and elsewhere and what efforts have been made by certain parties or interests to prevent passage of ship purchase bill. 1915, pts. 1–14, 459 p. *Spl. Comm. to investigate alleged ship purchase lobby.*

———. Material gathered by Legislative Reference Division of Library of Congress relating to foreign legislation on merchant marine. 1915. 31 p. *Commerce Committee.*

———. Report of committee on merchant marine of Boston Chamber of Commerce relative to bills pending before Congress relative to government ownership and operation of merchant vessels of United States in South and Central American trade. (S. doc. 715.) Paper, 5c.

———. Views of minority adverse to shipping bill. Jan. 4, 1915. 14 p. (S. rp. 841, pt. 2.) *Commerce Committee.*

Military education. Officers training corps of Great Britain, Australian system of national defense, Swiss system of national defense. Jan. 26, 1915. 159 p. (S. doc. 796.) *Senate.*

Munitions of war. Hearings on H. J. R. 377 and 378 on exportation of, Dec. 30, 1914–Jan. 5, 1915. 2 pts. 152 p. *For. Aff. Comm.*

———. Hearing on S. 6688 and S. 6862 to prohibit exportation of. 1915. 22 p. *Foreign Relations Committee.*

Naturalization laws and regulations. Dec. 19, 1914. 36 p. Paper, 5c.

Neutrality. Correspondence between Secretary of State and Chairman of Committee on Foreign Relations relating to complaints made that American Government has shown partiality to certain belligerents during present European War. 14 p. (S. doc. 716.) Paper, 5c.

———. Joint resolution to empower the President to better enforce and maintain neutrality of United States. March 4, 1915. (Pub. No. 72.) *State Dept.*

———. Rights of neutrals, address delivered before governing board of Pan-American Union by Romulo S. Naon, Argentine Minister, on. 5 p. (S. doc. 801.) Paper, 5c.

Niagara River. Views of minority adverse to H. 16542 for control and regulation of waters of. Feb. 13, 1915. 6 p. (H. rp. 990, pt. 2.) *For. Aff. Com.*

Opium and narcotic laws. (Pub. No. 221, 60th Cong., and Pub. Nos. 46, 47, and 223, 63d Cong.) 16 p. Paper, 5c.

———. Executive order relative to Canal Zone. March 1, 1915. (No. 2142.) *State Dept.*

Opium. Convention and final protocol between United States and other Powers, for the suppression of abuse of opium and other drugs. Signed at The Hague, Jan. 23, 1912 and July 9, 1913, proclaimed March 3, 1915. 32 p. [French and English.] (Treaty series 612.) *State Dept.*

———. Law and regulations relating to. Jan. 15, 1915. 26 p. (Regulations No. 35.) Paper, 5c.

———. Penalties. 1 p. (Treasury decision No. 2144.) *Internal Revenue Commissioner.*

Panama, Convention between United States and, relating to boundary of Canal Zone. Signed Panama, Sept. 2, 1914, proclaimed Feb. 18, 1915. 20 p. [English and Spanish.] (Treaty series 610.) *State Dept.*

Pan-American Medical Congress, Report amending S. J. R. 210 to authorize President to invite Central and South American governments to send delegates to, to be held in San Francisco, Cal., June 17–21, 1915. Feb. 15, 1915. 1 p. (H. rp. 1409.) *For Aff. Comm.*

———. Report favoring, Feb. 5, 1915. (S. rp. 966.) *Foreign Relations Comm.*

Parcel post agreement between United States and Gibraltar post offices, signed Dec. 7, 1914 and Jan. 8, 1915, approved Jan. 16, 1915. 10 p. *Post Office Dept.*

Peace, Treaty for advancement of, between United States and Norway, agreement extending time for appointment of commission under, signed Jan. 7 and 12, 1915. 4 p. (Treaty series 599½.) *State Dept.*

Philippines. Hearings on H. 18459 to declare purpose of the United States as to future political status of. Dec. 30, 1914–Jan. 11, 1915, with appendices and index. pts. 4–12. *Philippines Committee.*

———. Report amending. Feb. 2, 1915. 4 p. (S. rp. 942.) Paper, 5c.

Rio Grande River, Hearings on S. J. R. 183 for control and distribution of flood waters of. 1915. 41 p. *Irrigation and Reclamation of Arid Lands Committee.*

———. Report favoring, Feb. 17, 1915. 3 p. (S. rp. 992.) do. committee.

Seamen. Act to promote welfare of American. March 4, 1915. (Pub. No. 302.) *State Dept.*

———. Tables showing equipment and crew in steamboat service required by provisions of Seamen's bill in comparison with former law. 1915. 5 p. *Commerce Committee.*

Shipping. Act to provide for provisional certificates of registry of vessels abroad which have been purchased by United States citizens. March 4, 1915. (Pub. No. 321.) *State Dept.*

———-. Act to repeal penalties on foreign-built vessels owned by Americans. March 4, 1915. (Pub. No. 320.) *State Dept.*

Ships. Act for register and enrollment of vessels built in foreign countries when such vessels have been wrecked on coasts of United States, salved by American citizens and repaired in American shipyards. Feb. 14, 1915. (Pub. No. 254.) *State Dept.*

Transfer of flag, Extracts from proceedings of International Naval Conference, London, 1908, and of Institute of International Law, 1882 and 1913, concerning. 1915. 23 p. *Foreign Relations Committee.*

War claims, Laws of United States and decisions of courts relating to. 1914. 248 p. *War Claims Committee.*

GEO. A. FINCH.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

BRITISH PRIZE COURT DECISIONS.

THE MIRAMICHI (CARGO EX.)

Decided November 2, 23, 1914.

(*The Times* Law Reports, Vol. 31, p. 72.)

Enemy goods in a British vessel are subject to seizure in port in time of war—Where goods are contracted to be sold and are shipped during peace without any anticipation of imminent war and are seized afloat after war has supervened, they are not subject to seizure unless under the contract the property in the goods has by that time passed to the enemy—It is not the incidence of risk but the intention of the parties that is the determining factor of ownership—Goods the property in which has not passed to the buyers are not subject to seizure and must be released to the sellers.

The facts are stated in the judgment.

Sir Samuel Evans, President of the Court, in delivering the judgment, said: The subject-matter of the claim is a part cargo of 16,000 bushels of wheat carried in the steamer *Miramichi*, which was seized or captured as enemy property on September 1, 1914. The *Miramichi* was a British ship. The cargo of wheat to which the claim relates was shipped at Galveston (Texas) in July of this year before the beginning of the war, and without any anticipation of war. It was destined for Rotterdam, and was intended to be delivered, as to part to George Fries and Co., of Colmar, as purchasers of 8,000 bushels, and as to the other part to Gebrüder Zimmern and Co., of Mannheim, as purchasers of 8,000 bushels. Both these firms were German firms, and at the time of seizure or capture of the cargo were enemy subjects.

The two transactions were separate, but there is no distinction in substance, or from the legal aspect, between the two. It will therefore be sufficient to deal in this judgment with one of the cases, and I will take the sale by Messrs. Muir and Co. to Fries and Co. On the vessel's voyage towards Rotterdam the owners by telegraph directed her to proceed to Queenstown for orders because of the outbreak of war. At

Queenstown the owners communicated with the British Admiralty, and permission to proceed to Rotterdam was refused, Accordingly the vessel proceeded to Eastham, in the Manchester Ship Canal, as the best port for the disposal of the cargo. A question might have arisen whether the cargo was captured at sea or seized in port. But that makes no material difference, and it is agreed that the cargo was seized in the port of Eastham on September 1. The Crown claim the cargo as prize or as droits of Admiralty. The claimants contend that the cargo was not subject to seizure, as it did not belong to enemy subjects, but to themselves as neutrals, being citizens of the United States.

The contention of the Attorney-General for the Crown was that the cargo at the time of seizure was at the risk of subjects of the German state then at war as purchasers, and therefore was subject to seizure on behalf of the Crown. The contention of the claimants, on the contrary, was that the cargo was their property, and therefore could not be lawfully seized. The contract, and all material transactions in relation to it up to the time of seizure of the cargo, were entered into before the war, and in entire innocence of any anticipation of war. In short, all the transactions so far as concerned the claimants were carried out in times and conditions of peace. The claimants were the sellers of the goods, and their bankers who discounted the bill of exchange. They have made common cause, and no distinction need be made between them in this judgment. I will describe the claimants, Messrs. Muir and Co., as "the sellers"; and Fries and Co., the German merchants, as "the buyers."

The sellers contracted to sell the cargo to the buyers on June 25, 1914, for shipment during July, at a price to include cost, freight, and insurance. Payment (or in the American terminology "reimbursement") was to be "by check against documents." The sellers were to furnish policies of insurance or certificates of insurance (free of war risk). A clause of settlement of disputes in London was included, which shows that any disputes were to be determined according to English law. The sellers had bought the wheat to enable them to fulfil their contract with the buyers, from C. B. Fox, in Galveston. The wheat was shipped by Fox at Galveston on July 23. The bill of lading was given in favor of Fox, the shipper, and was made out to the order of one Davis, or to his or their assigns. It was indorsed generally, and in due course the sellers paid Fox for the wheat and obtained the bill of lading. They did not indorse in favor of the buyers, and it remained a bill of lading only

indorsed generally. The necessary insurances were effected, and the certificates of insurance were obtained by the sellers on July 23.

On July 28 the sellers drew a bill of exchange upon the buyers, and, according to the statement of the Attorney-General, discounted it with the bankers (the Guaranty Trust Company, of New York, who have joined them as claimants). On the same date they deposited with the bankers the bill of lading and certificates of insurance, to be delivered up on payment by the buyers through a Berlin bank of the amount due on the bill of exchange for the cost and insurance, less the freight which was credited, as it was to be paid for by the buyers on delivery.

On the same date, also, the original documents were forwarded to the Berlin bank for credit of the New York bank by the steamer *La Savoie*, which left New York on July 29 and arrived at Le Havre on August 5; and duplicate documents were forwarded by the steamer *Carmania*, which left New York on July 29 and arrived at Liverpool on August 7. The buyers were duly notified of these matters, and an invoice was forwarded to them by the sellers on the same day (July 28), with all the necessary particulars of the shipment, bill of exchange, and documents.

So far as the buyers are concerned, no further information was given to the court except that the documents were tendered to them, and that on the tender they refused to accept the documents, or to pay the sums due under the bill of exchange and indorsed on the bill of lading as follows:—

"Refused on account of late production, nearly one month after normal due date.—Colmar, Sept. 3, 1914.—GEO. FRIES."

That reason was a mere excuse; the real reason, no doubt, was that war had broken out. The sellers, therefore, or their bankers, still hold the bill of lading, and the bill of exchange remains unpaid.

The question of law is: Was the cargo on September 1 subject to seizure or capture by or on behalf of the Crown as droits of Admiralty or as prize? Before this question is dealt with I desire to point out that nothing which I shall say in this case is applicable to capture or seizure at sea or in port of any property dealt with during the war or in anticipation of the war. Questions relating to such property are on an entirely different footing from those relating to transactions initiated during times of peace. The former are determined largely or mainly upon considerations of the rights of belligerents, and of attempts to defeat such right. I will refrain from discussing these matters, and will only refer to such authorities as the *Sally*, heard on appeal by the Lords Commis-

sioners of Appeals in Prizes in 1795, and reported in a note on page 300 of 3 C. Rob.; the *Packet de Bilboa* (2 C. Rob., 133, and 1 E. P. C., 209); and the *Ariel* (11 Moore P. C., 119, 2 E. P. C., 600) for the principles applicable in the prize court during a state of war.

In the case now before the court, there is no place for any idea of an attempt to defeat the rights of this country as a belligerent; and the case has to be determined in accordance with the principles by which rights of property are ascertained by our law in time of peace. The main contest was as to the right test to apply in these circumstances for determining whether a particular property was subject to seizure or capture. Another point was taken, and argued chiefly by junior counsel for the claimants, that in any event enemy property in a British ship could not be seized in port or captured at sea.

I will state the contention and propositions submitted by the learned Attorney-General in the words of the propositions which he submitted. He said:

> My first proposition is that the test of the right to capture and sale is the answer to the question, "On whom is the risk at the moment of capture?" That is to say, who suffers if the goods are captured? Applying that test, the American claimants here would have had a *jus disponendi*, because they are holding the bill of lading, which has not been indorsed, and therefore they would have to that extent of course a special property, a proprietary interest in the cargo, but they would not have a general property in the cargo; still less would they have the risk. And there is a third proposition, which is really a development of the other proposition, *viz.*, the American sellers had a vested right of payment, whatever happened to the goods on the tender of the documents, and I will add as a point for my third proposition: that for the purpose of determining whether the cargo is good prize (which is quite a separate question from the other), the material question is not the abstract question of property, but whether it is an enemy or a neutral who will suffer if the cargo is condemned—on whom is the risk?

And summing it up, the learned Attorney-General later submitted:

> If my main proposition is right, that in a prize court one is not concerned with these niceties about the abstract law of property, the point really is, at the moment of capture, the goods being on the high seas, is it or not open to the consignor to compel payment by the consignee? That is the real test. Then plainly I am entitled here to the condemnation of the goods.

As I have intimated, it was subsequently assumed, and for this purpose agreed by the Attorney-General, that the goods were seized when afloat in port; but that makes no material difference.

The contrary contention of Mr. Leslie Scott for the claimants was that "The true criterion to apply where goods are shipped before war is,

whose goods are they? In whom is the property in the sense of a beneficial ownership of the goods vested?" Very difficult questions often arise at law as to when the property in goods carried by sea is transferred, or vests; and at whose risk goods are at a particular time, or who suffers by their loss. These are the kinds of questions which are often brushed aside in the prize court when the transactions in which they are involved take place during war, or were embarked in when war was imminent or anticipated.

Where, as in the present case, all the material parts of the business transaction took place *bona fide* during peace, and it becomes necessary to decide questions of property, I hold that the law to be applied is the ordinary municipal law governing contracts for the sale and purchase of goods. Where goods are contracted to be sold and are shipped during peace without any anticipation of imminent war, and are seized or captured afloat after war has supervened, the cardinal principle is that they are not subject to seizure or capture unless under the contract the property in the goods has by that time passed to the enemy. It may be that the element of risk may legitimately enter into the consideration of the question whether the property has passed or has become transferred.

But the incidence of risk or loss is not by any means the determining factor of property or ownership. (Cf. section 20 of the Sale of Goods Act, 1893). The main determining factor is whether according to the intention of seller and buyer the property had passed.

The question which governs this case, therefore, is: Whose property were the goods at the time of seizure? (See the *Cousine Marianne*, Edw., 346, and 2 E. P. C., 85; the *Ida*, Spinks, 26, and 2 E. P. C., 268; the *Abo*, Spinks, 42, and 2 E. P. C., 285; the *Vrow Margaretha*, 1 C. Rob., 336; 1 E. P. C., 149; and the *Ariel*, 11 Moore, P. C., 119, and 2 E. P. C., 600.) The Attorney-General did not argue that the property had passed to the enemy buyers. He admitted that the neutral sellers had a *jus disponendi*, because they held the bill of lading, which was not indorsed, although possibly he may have intended to qualify this admission by saying that "therefore the sellers would have to that extent a special property" in the goods. But, at any rate, as he did not contend that by law the property had passed to the buyers, I think it sufficient to deal briefly with the matter, and to state my conclusions without elaborating the grounds.

In my opinion, the result of the many decisions from Wait *v.* Baker ([1848] 2 Ex., 1) up to Ogg *v.* Shuter ([1875] 1 C. P. D., 47); Mirabita *v.*

Ottoman Bank ([1878] 3 Ex. D., 164); and thence up to the Sale of Goods Act, 1893; of the provisions of the Sale of Goods Act, 1893, itself (following closely on these matters the judgment of Lord Justice Cotton in Mirabita *v.* Ottoman Bank); and of the decisions after the Act—*e. g.*, Dupont *v.* British South Africa Company ([1901] 18 *The Times* L. R., 24); Ryan *v.* Ridley ([1902] 8 Com. Cas., 105; 19 *The Times* L. R. 45); and Biddell *v.* Clemens Horst ([1911] 1 K. B., 214 and 934; [1912] A. C., 18; 27 *The Times* L. R., 47 and 331; 28 *The Times* L. R., 42)—is that in the circumstances of the present case the goods had not at the time of seizure passed to the buyers; but that the sellers had reserved a right of disposal or a *jus disponendi* over them, and that the goods still remained their property, and would so remain until the shipping documents had been tendered to and taken over by the buyers, and the bill of exchange for the price had been paid. It follows that the goods seized were the property of the American claimants; and were not subject to seizure. The court decrees accordingly, and orders the goods to be released to the claimants.

Another point was that, as the cargo was in a British ship, it could not be seized or captured, even if it was enemy property. In my opinion, this proposition is wholly lacking in foundation. No authority was cited for it. Such a contention has never been put forward, because I think no one has thought that it could prevail. Enemy property at sea or in port can be captured or seized except where an express immunity has been created. Abundance of authority exists for this in the books of international jurists (Wheaton's International Law, edited by Mr. Dana, 1866, Section 355 and Note 171).

His Lordship quoted the passages, and continued:

There is no distinction now to be made between capture at sea and seizure in port, and—apart from the practice introduced by the Declaration of Paris in favor of neutral vessels—it does not matter in what ships the cargoes seized may happen to be. According to the Order made in Council in 1665 as to the rights of the Lord High Admiral in former times, which are now the rights of the King in his office of Admiralty, "all ships and goods coming into ports, creeks, or roads of England or Ireland unless they come in voluntarily on revolt, or are driven in by the King's cruisers," belonged to the Lord High Admiral and now belong to the Crown. And according to Lord Stowell, "Usage has construed this to include ships and goods already come into ports, creeks, or roads, and these not only of England and Ireland, but of all the Dominions there-

unto belonging" (see the *Rebeckah*, 1 C. Rob., 227; 1 E. P. C., 118). It has never been urged that enemy goods are free from capture or seizure if they happen to be in British ships.

This is, no doubt, the reason why there are no reported judgments upon the point; but if decisions of prize courts are desired to show that enemy cargoes in British ships have been captured, reference can be made to the *Conqueror* (2 C. Rob., 303); and the *Mashona* (10 *Cape Times* Law Reports, 163, and the *Journal of Comparative Legislation*, 1900, page 326). See also the Cargo *ex* Emulous (1 Gallison, 562); *sub nomine* Brown *v.* The United States (8 Cranch, 110) for the opinion of Mr. Justice Story in similar cases.

As to the suggestion that the right of seizure or capture of enemy property carried as cargoes in British ships no longer exists after the Declaration of Paris, it is obvious that the Declaration only modified or limited the right in favor of neutrals for the benefit and protection of the commerce of neutrals and in the interest of international comities; and did not in any other respect weaken or destroy the general right. It is well known that the United States of America refrained from acceding to the Declaration of Paris because they desired that all property of private persons should be exempted from capture at sea, to which other states have always refused to agree. And in practice, what would become of such cargoes? A British ship could not in times of war carry it or hand it over to the enemy either directly or through any intermediary, as it is not permitted for her to have any intercourse with the enemy. In my view, it is abundantly clear that enemy goods carried in British vessels are subject to seizure in port and capture at sea in times of war.

His Lordship ordered the payment out of court of the proceeds of the sale of the cargo to the claimants' solicitors. He gave no costs and, on the application of the Attorney-General, granted a stay of execution.

The Schlesien

Decided November 30, 1914.

(*The Times* Law Reports, Vol. 31, p. 89.)

Submarine signalling apparatus found in a captured enemy ship, even if it is the property of neutrals and has only been leased to the owners of the ship, is nevertheless subject to condemnation as being part of the ship.

This case involved a claim by the Submarine Signal Company, an American company, to an apparatus for transmitting sounds received

through the water to the chart-room, which apparatus was fixed and fitted in the German steamship *Schlesien* when captured by a British cruiser and subsequently condemned as prize. The claimants alleged that their apparatus had been leased by their agency at Bremen to the German vessel and remained their sole property; that it was not a part of the tackle of the ship and came within the principles of the Declaration of Paris as being neutral property in an enemy ship and should not, therefore, be condemned. Sufficient evidence was not produced to prove the alleged agency and lease, but the court, admitting these facts for the purpose of the judgment,

Held, that the term "neutral goods" or "enemy goods" in the Declaration of Paris had always been read as applying to cargo, and from the use in the French text of the word *marchandise*, it was clear that it was intended to cover "merchandise." The apparatus in this case was not merchandise but should be regarded as a part of the ship, and the court could not investigate questions of property in different parts of the ship.

THE ROUMANIAN (CARGO EX.)

Decided December 7, 1914.

(*The Times* Law Reports, Vol. 31, p. 111.)

A cargo of oil belonging to a German company was seized as prize while it was being discharged by means of pumps from a steamer, owned by an English company, into tanks on a wharf at Purfleet which were owned by another English company.

Held, that the whole of the oil was maritime prize and was subject to seizure both on board the steamer and in the tanks; that the portion in the tanks was seizable even if they were to be regarded as being, in the strict sense, on land as distinguished from the port, but that for this purpose they were in port; and that therefore all the oil was liable to condemnation as prize.

The facts are stated in the judgment.

Sir Samuel Evans, President of the court, in delivering the judgment said: This cargo consisted of 6,264 tons of refined petroleum oil in bulk. It was shipped in the *Roumanian* at Port Arthur, Texas, before the outbreak of the war. The cargo of oil was destined for Hamburg. At all times material the oil was the property of a German company. As enemy property it is claimed by the Crown as lawful prize. On the other hand, the German owners claim that it could not lawfully be seized; and,

alternatively, that a portion of the oil which had already been discharged into oil tanks on shore could not lawfully be seized.

The main question arises on the claim put forward by the owners of the oil. Three limited companies come into the history of the case. They are:

(1) The Europäische Petroleum Union Gesellschaft, M. B. H., of Bremen. Neutral bodies and subjects are shareholders to a considerable extent in this company. It is a corporate body duly incorporated under the laws of Germany, and as such entered an appearance in these proceedings. It clearly is a German company. This company I shall refer to as "the German company." They were the owners of the oil.

(2) The Petroleum Steamship Company (Limited). This was an English company incorporated under the Companies Acts, 1908 and 1913. The vast majority of the shares were owned by the German company, but there were also English shareholders and English directors, and its business was carried on in this country. This company I shall refer to as "the steamship company." They were the owners of the steamship *Roumanian*.

(3) The British Petroleum Company (Limited). This was also an English company, and is referred to as "the tank company." They were wharfingers, and the owners of the tanks into which some of the oil had been discharged.

The material facts are substantially undisputed. While the *Roumanian* was on her voyage on the high seas the secretary of Lloyd's wrote to the managers for the steamship company that the Admiralty had suggested that in the national interest the *Roumanian*, which, according to Lloyd's Records, was then on passage to Hamburg, should be diverted to a United Kingdom port. When the vessel had reached the English Channel her master about August 14 received instructions from her owners to proceed to Dartmouth for orders. The vessel arrived there apparently on August 14. She remained until August 18, when her masters ordered her to proceed to London. She arrived at Purfleet on August 21, and was moored at the tank company's wharf, at noon. The discharge of the oil into the tanks of the tank company by means of pumps and connecting pipes was immediately begun. Information has to be given (and was in this case given by the ship-brokers) to the custom house officer of the arrival of the steamship, in order that the oil may be tested to ascertain whether it is subject to duty or not. The officer visited the steamer on August 21. Some of the oil had already been dis-

charged. He tested a sample taken from one of the ship's tanks. It was somewhere near the dutiable line; so he took away a sample to be tested in the laboratory of the custom house. He went again to the vessel on the next day and took another sample, this time from the discharging pipe. He did not receive the test note from the custom house analyst until August 24. Meantime, on August 22, a letter was delivered on board the steamer from the custom house officer at Gravesend, of wihch the following is a copy:—

Custom House, Gravesend, 22.8.14.

To the Master, s.s. Roumanian, Purfleet.

Sir,—I have to inform you that your cargo, consisting of about 6,264 tons of refined petroleum oil, is placed under detention.—your obedient servant,

H. BURRELL, senr.

At this time 4,800 tons had been discharged from the vessel into the tanks, and 1,400 tons still remained in the vessel. The test note afterwards given on August 24 showed that the oil was of a quality admitted free of duty. The customs officer first referred to deposed that until the cargo is certified free of duty it is still regarded as being in the charge of the customs, and an offence against the revenue laws would have been committed if any delivery had taken place before. It is quite clear that by international law, the 1,400 tons was confiscable as prize on board a ship which arrived in port after outbreak of hostilities.

In the claim the German owners invoke the Hague Convention No. 6. But the Hague Convention is not applicable. If the case is regarded as analogous to that of an enemy cargo on board an enemy ship under Articles 3 and 4 of the Convention, in any event German subjects could not found any claim under those articles because Germany declined to agree to them, and is not a party to them.

The main question was whether the 4,800 tons already discharged and in the tanks of the tank company were confiscable is prize. The broad foundation of the argument for the German company was that this oil was on land, and that enemy property on land cannot be seized as prize. The tanks were contiguous to the tank company's wharf, where the ship was moored, and were used in conjunction with the wharf for dealing with oil cargoes. Their distance from the wharf was between 100 and 150 yards. Was the oil in the tanks on land as this phrase has been used in international law; or was it still in port for the purpose of applying the principles of seizure of enemy property in port? Again, even if in

strictness it was on land, was it in the circumstances immune from seizure and free from confiscation in a court of prize?

According to the practice of former times and according to the views held by some of the most authoritative international jurists, all enemy property on land as well as on sea and in ports, creeks, and rivers could be captured and confiscated. But, by special treaties, and subsequently by the mitigation of rules considered to operate harshly on enemy owners of private properties, capture of such properties on land has been avoided and has fallen into desuetude. The present position is well stated in Hall's International Law (page 435 of the sixth edition). I have before had occasion to refer to a note by Dana in his edition of Wheaton (eighth edition, 1866).

His Lordship quoted the passage on "the Distinction between Enemy's Property at Sea and on Land," p. 351, and continued:

We start accordingly in the present case with the broad proposition that all enemy property—ships and cargoes—may, after the outbreak of war, be captured *jure belli* on the sea, or in rivers, ports, and harbors of this country. All such captures are tried in the prize court, and can only be condemned in this court. "The nature of the ground of the action—prize or not prize—not only authorizes the prize court, but excludes the common law." Lord Mansfield in Lindo *v.* Rodney (2 Doug., at page 614a).

The learned President then read a passage from the commission to the court issued by the Crown at the beginning of the war, and said: As Lord Mansfield stated in Lindo *v.* Rodney: "The commission does not say—upon the sea. It does not say—goods in the ship. 'Reprisals' is the most general word that can be used." Now the *Roumanian*, from the outbreak of war, carried an enemy cargo. This cargo as such was subject to capture or seizure as prize, either on the high seas, or after the arrival of the vessel in port. The vessel was not bound to come into a port of this country. But she was in a dilemma. As the vessel came, and properly came, into a British port, she could not help bringing the oil into the port too, unless she pumped it into the sea. She was not bound to do that. If I may personify the cargo for a moment, I should ask, What right of entry had it into this country? What right had it to expect protection in this country at someone's care and expense, for the sake of its owners? Its owners could not have ordered its delivery to anyone here on their behalf; no one could have accepted its delivery for them, as that would be against the law. It may be that the ship-owners could

have exercised their lien for freight by selling it, or part of it, if it had not been seized, but they did not purport to do so. It was delivered—or rather 4,800 tons of it were pumped into the tanks; and there it was, subject by some kind of tacit understanding to the lien for freight. It was a sort of *nullius bonum*. It came into the port as maritime merchandise of the enemy, subject to seizure, and in my opinion the whole of it remained such until it was actually formally seized on behalf of the Crown on August 22. I cannot see how or by what process the portion of it which was at one end of the pipe in the tanks on shore had ceased to be seizable enemy cargo any more than the portion remaining in the ship at the other end had.

But it was argued, as to the 4,800 tons, that the seizure was on land as distinguished from in port; and therefore that the court had no jurisdiction over it as prize. The word "port" may bear different meanings in different connections. In relation to enemy goods—by their nature the subject of naval prize when at sea after the beginning of the war—I think the word "port" has a meaning extended beyond the part covered with water in which a ship carrying the goods would be afloat. Indeed, counsel for the German owners conceded that a wharf alongside would come within the "port" in this sense, although it would be strictly "on land." I fail to see what difference the 100 yards from the edge of the wharf ought to make.

His Lordship quoted from Hale's *De Portibus Maris* as to the definition of "port" (Hargrave's Law Tracts, pages 46, 47, 48), and continued: It will be observed that "warehouses" are expressly included in the definition of "port." And the tank company's tanks in the present case could not be placed in a category higher than, or different from, warehouses. The tanks are oil warehouses.

The *Ooster Eems* and *The Two Friends* (1 C. Rob., 271; 1 E. P. C., 130 and 136) were referred to. The facts in this case were quite different.

Counsel for the German company also cited the *Hoffnung* (No. 3) and the *Charlotte*, referred to in a note to the same case (6 C. Rob., 383 and 386; 1 E. P. C., 583 and 585). It does not seem to me that either of these decisions can assist the claim of the German owners in the present case. The other authority referred to was the well-known case of Brown *v.* The United States (8 Cranch, 110). In the District Court it was tried before Mr. Justice Story, and is there reported as "the cargo of the ship Emulous" (1 Gallison, 563). Mr. Justice Story also sat in the Supreme Court on the appeal and was one of the dissenting judges.

The ultimate and actual decision was that the property was on land, and was found on land at the beginning of hostilities, and that therefore it could not be condemned as enemy property without a legislative Act of Congress authorizing its confiscation. Of course, the decision is not binding in this court. I refrain from attempting to weigh the judgments. I only desire to emphasize that the ground of the decision was that the property was not only found to be seized on land, but especially that it was found within the territory of the belligerent at the beginning of hostilities.

I now finally desire to refer to some cases in this country which are not reported. They are noted in a most valuable and elaborate report in MS., which was drawn up by Mr. Rothery, a former Registrar of the Court of Admiralty during the Crimean War, and presented to one of our public departments in 1857. It represents two or three years' labor, and shows scrupulous care and great skill and learning. Its chief object was to ascertain how and to what extent captors had been rewarded for prizes taken. I could wish it were accessible in print to those interested in these subjects. That, also, is the opinion of Mr. Roscoe, the Registrar, through whose kindness I have become acquainted with it. In perusing it, I have come across the following cases of interest bearing upon the question now before the court.

One related to a seizure effected at Ramsgate. The following is the extract from the MS. report:

> It is that of the French vessel *Marie Anne* (Warrant No. 97). It appears from the King's Proctor's report in this case bearing date February 26, 1805 (Treasury No. 1028), that on the breaking out of hostilities with France on May 16, 1803, John Friend, of Ramsgate, in the county of Kent, shipbuilder, having obtained information that a ship called the *Marie Anne* (then under repair in his own yard at Ramsgate) and certain parts of the cargo thereof, which had been landed and deposited in warehouses, were French property, seized the said ship and goods, as being the property of his Majesty's enemies, and with great difficulty obtained the papers and documents belonging to the ship and cargo from the merchants, in whose hands the same had been deposited, and took the master and other necessary witnesses to Deal and caused them to undergo their examinations before the proper commissioners there, in order that the said ship and goods might be legally brought to adjudication. The result of these proceedings was that the ship and cargo were condemned as droits of Admiralty and after payment of all expenses realized the sum of £2,667 1s. 8d. Upon an application being subsequently made for a grant the King's Proctor reported that a grant of £400 would be a liberal reward to Mr. John Friend for his services. Accordingly a grant to that extent was made, thus giving the seizor somewhat less than one-sixth of the proceeds.

This is a case directly in point, as the cargo seized had been landed and deposited in warehouses.

The next case is the *Berlin Johannes* (Warrant No. 77). The extract is as follows:

> It appears from the warrant in this case that the marshal of the Admiralty had received information that the *Berlin Johannes*, then lying in the River Thames, which had arrived from Rotterdam with a cargo of Geneva, was enemy's property. He accordingly seized her, but at that time the greater part of the cargo had been discharged. Proceedings were commenced in the court of Admiralty, when it transpired that the ship had formerly belonged to British subjects, and was accordingly restored to them on payment to the marshal of one-sixth part of the value, that being the usual proportion paid to non-commissioned persons in case of recapture. The cargo, however, proved to be enemy's property and was accordingly condemned as droits of Admiralty, and on being sold realized the sum of £504 9s. 7d. This warrant grants to the marshal one-sixth of the proceeds "as an encouragement for his vigilance and attention."

I have tried, for so far without success, to obtain the original papers in this case, in order to see whether the part of the cargo which had been discharged was condemned. I see no reason to doubt that it was; because if any distinction was made between the part discharged and the part not discharged that would almost certainly have been mentioned in the report.

The next case is that of the *Venus* (Warrants Nos. 220 and 221). The extract from the report is as follows:

> It appears from the warrants in this case that William Davies, the master of the British vessel *Venus*, whilst bound on a voyage to Hamburg with a cargo which he had taken on board at Genoa and other ports, received information that war had broken out between France and England, and he accordingly put into the port of Plymouth, not only for the safety of his own vessel, but also to ascertain the nature of the cargo which he had on board, and which he believed to be French. He accordingly communicated his suspicions to George Eastlake, the Receiver of Admiralty droits at Plymouth, who ordered the same to be seized. The result was that the ship and a considerable part of the cargo were restored, but the remainder of the cargo, proving to be enemy's property, was condemned as droits of Admiralty, and realized the sum of £531 18s. 8d., after payment of all expenses. On an application, the Crown granted 50 guineas as a reward to the master of the *Venus* in consideration of his conduct in the matter, and 100 guineas to Mr. Eastlake in consideration of his having seized the ship and cargo at his own risk. The two grants together were between a third and a fourth of the net proceeds.

I have set out this case because, in the action of the master in bringing his vessel into a British port, there is a close resemblance to the course of

events resulting in the s.s. *Roumanian* being diverted to Dartmouth and Purfleet, and also because it shows that enemy cargoes in British vessels were condemned. Counsel for the claimants intimated that he would have argued that in such a case the goods were not confiscable, but for the fact that I have in previous cases in this court decided the contrary.

There is one other matter to which I wish to refer before stating my conclusions. It may be suggested that even if the oil in the tanks were confiscable as enemy property on land, it is not the subject of prize within the jurisdiction of the prize court. While I think it is, I cannot see what advantage would accrue to the German company, especially in these days when all the divisions are parts of one High Court, if the questions arising were admitted (if they could be admitted) to be decided in a common law or other court in this country. To adopt a metaphor employed by Lord Stowell, it would be but to make a change of postures on an uneasy bed.

Applying the principles of the law of nations to the present case, I have come to the conclusion that the whole of the oil cargo of the *Roumanian* was maritime prize, subject to seizure both on board and in the tanks; that the case falls within the jurisdiction of this court; that the portion in the tanks was seizable even if they have to be regarded strictly as being on land as distinguished from the port; but also that the tanks were within the port; and that all the oil was seized, and lawfully seized, by the customs officers on behalf of the Crown, and must be condemned to the Crown as prize in the Crown's rights to droits of Admiralty. I decide, therefore, against the claim of the German company, and decree condemnation of the whole cargo.

As to the claim for freight, by consent the Crown will pay what is decided by the Registrar and merchants to be the reasonable amount.

As to the charges for landing and storing in the tanks, the Crown also assents to payment, either to the shipping company or to the tank company (whichever may be entitled) of the proper sums to be ascertained also by reference to the Registrar and merchants. The claims for demurrage at Dartmouth and for coal consumed are disallowed. The Port of London dues are to be paid by the captors. The claim for inspecting cargo is assented to by the Crown, and is allowed. The claim for interest is disallowed. The claims for insurance stand over. Liberty to the claimants to apply in respect of them.

As to the suggestion made by Mr. Attorney-General that the amount of the claims which are allowed should not be paid over till further order,

I see no reason why the amounts when ascertained should not be at once paid to the claimants, upon the understanding, or upon a guaranteed undertaking if applied for by the Crown, that no part of the money should be handed over to enemy subjects. Liberty to the Crown to apply as to this.

Leave to appeal to the Privy Council was granted, but Sir Samuel Evans refused to restrain the Crown from selling the oil pending the hearing of the appeal.

THE JUNO.

Decided December 14, 1914.

(*The Times* Law Reports, Vol. 31, p. 131.)

The steamship *Juno*, a British vessel belonging to the Bristol Steam Navigation Co. (Limited), on July 28, 1914 shipped certain cargoes at Bristol. The cargoes were destined ultimately for various places in Germany, but the sea voyage destination in each case was Amsterdam. After leaving Bristol the vessel called at Swansea to load other cargo. She finished her loading there on August 1st, but her owners decided to delay her departure through fear of complications on the Continent. While the vessel lay at Swansea her cargo was seized and subsequently condemned as lawful prize, and the owners of the vessel put in a claim for freight.

Held, The shipowners are entitled to claim from the Crown such a sum for freight as is fair and reasonable in all the circumstances, regard being had to the rate of freight agreed, the extent to which the voyage has been made, the costs incurred before the seizure, and the benefit accruing to the cargo from the actual carriage, but in the absence of special circumstances no sum should be allowed for delay or inconvenience resulting to the ship from her diversion or detention for the purpose of the seizure.

THE ODESSA (CARGO EX.): THE CAPE CORSO (CARGO EX.)

Decided December 21, 1914.

(*The Times* Law Reports, Vol. 31, p. 148.)

The rights of pledgees of cargo are not regarded in the prize court.

The facts sufficiently appear in the judgment.

Sir Samuel Evans, the President of the court, said: The claims to the cargoes in these two cases are of a like nature. The subject-matter of the

claim in the first case is 51,043 bags of nitrate of soda, laden in the German barque *Odessa*, which I have already condemned. The cargo was captured at sea on August 19. The claimants are J. Henry Schröder and Co., of Leadenhall-street, London—a firm of which Baron von Schröder, a naturalized subject of this kingdom, and Frank C. Tiarks, a British subject, are the partners. The cargo was bought from Weber and Co., a firm of Chilean merchants, at Valparaiso by the Rhederei Aktien Gesellschaft von 1896, a German company carrying on business at Hamburg. By arrangement between this German company and Schröder and Co. the latter accepted bills of exchange in favor of the sellers against the cargo, and received the bills of lading as security for the acceptances and the moneys payable under them. The bill of lading in this instance was dated May 8, 1914, and made out in favor of J. Henry Schröder and Co., London, or their assigns. The vessel was stated therein to be "bound for Channel for orders."

Fifteen bills of exchange for various amounts were accepted by Schröder and Co. on June 4, 1914, and 21 others on June 9, and as the time of payment had been extended by proclamation the actual dates for payment were October 19 and 24. Therefore when Schröder and Co.'s claim was made the bills had not been met. They have since been paid, and the total sum amounts to £41,153. The claimants claim the cargo "as being the property of British subjects, and as holders for full value of the bills of lading therefor," and "as the persons beneficially interested in the cargo."

The subject-matter of the second claim is a quantity of wood laden in the *Cape Corso*, a British vessel, She was detained for some days at Suez on August 7, and the cargo was seized on the arrival of the vessel at Brixham on August 26. The claimants are Wm. Brandt, Sons, and Co., of Fenchurch-avenue, London, a firm of British subjects. The cargo was purchased from one Shütze, of Otaru, Japan, by one Leo. Küpper, of Hamburg, a German subject. The vessel was chartered to Küpper. The goods were shipped in Japan, and the vessel was bound for Rotterdam, or, at the option of the charterer, for Hamburg. By arrangement between Küpper and the claimants, the latter gave to Mitsui and Co., in London, on behalf of their house at Otaru, letters of credit authorizing them to negotiate drafts of Shütze on the claimants for the cargo purchased from him by Küpper. A certain number of bills of exchange were accepted by the claimants before the war, which fell due after the war, but which have now been paid. The bills of lading were made out to

Shütze's order or assigns, and were indorsed generally by Shütze. They were received in due course by the claimants as security against their acceptances. The claimants then forwarded them to their agent at Hamburg to deliver up to Küpper against payment, and some of them were presented before the war. Certain collateral securities were given to the claimants by Küpper, in part by a guarantee of the Rheinische Creditbank Filiale, Karlsruhe, and in part by a deposit with the claimants. The balance of account stated by the claimants to remain due from Küpper is £6,104. The claim was formulated by the claimants as follows:

(*a*) (1) A declaration that the goods are their property.

(2) Release to them of the said goods.

Alternatively—

(*b*) (1) A declaration that they are entitled to possession of the goods.

(2) Release of the goods to the claimants for sale and retention by them out of the proceeds of sale of the amount paid by them for the bills of lading and of the amount of costs, losses and expenses (if any).

(3) Alternatively payment to them out of the proceeds of sale of the goods of the amounts referred to in (2).

It was admitted for the claimants in each case (1) that in law the property in the cargoes had been transferred to and become vested in the German purchasers and that the latter were at all material times the legal "owners" of the cargoes; and (2) that the claimants were merely pledgees of the bills of lading representing the cargoes as security for moneys advanced, or agreed to be advanced.

The questions of law now raised are whether the prize court should, nevertheless, regard the claimants as the real owners of the goods, and should therefore release the goods captured on the ground that they were not "enemy property"; or whether the court should in some way take cognizance of their claims, and direct the captors or the marshal to pay them out of the proceeds. At the outset two things must be remembered; first, that this is a court of law; and, secondly, that the law to be administered here is the law of nations, *i. e.*, the law which is generally acknowledged to be the existing law applicable between nations by the general body of enlightened international legal opinion. The decisions of a court of law should proceed upon defined principles. Those principles have to be applied to ever varying sets of facts. In the domain of international law in particular there is room for the extension of old doctrines or the development of new principles, where there is, or is

likely to be, a general acceptance of such by civilized nations. Precedents handed down from earlier days should be treated as guides to lead and not as shackles to bind. But the guides must not be lightly deserted or cast aside. Already, in the course of the present war, I have had to deal with questions not remote from those raised in these proceedings.

In the *Marie Glaeser* (31 *The Times* L. R., 8; [1914] P. 218) the positions of owners of enemy vessels and of other persons, neutral and British subjects, claiming liens or charges upon the vessels, fell to be decided. In the *Miramichi* (31 *The Times* L. R., 72) rules for determining the "ownership" of cargoes laden in an innocent ship had to be laid down.

In the *Marie Glaeser* the decision was that in cases of capture no mortgages, liens, or charges on an enemy ship could be set up in this court against the captors. In the *Miramichi* it was held that in cases of seizure the "ownership" of or "property" in a cargo shipped during peace depends upon the municipal law governing contracts for the sale and purchase of goods. I must adhere to those decisions, unless and until they are corrected by a higher tribunal. As to charges or liens no doubt a distinct line could be drawn between ships and cargoes laden in them, if it were deemed right to make such a distinction. But it has never yet been made, I think, in any authority of the prize court of any nation. The reasons for not allowing any charges or liens against ships are set out in the *Marie Glaeser* and the many authorities therein cited. I will just refer to three instances—the *Marianna* (6 C. Rob., 24; 1 E. P. C., 518), the *Ida* (Spinks, 26; 2 E. P. C., 268), and the *Carlos F. Roses* (177 U. S. Reports, 655). It is impossible to distinguish the two last named cases from those with which I am now dealing.

In the first case now before the court (the *Odessa*) the vessel and the cargo are both "properties" belonging to enemy subjects. What reason of any validity, or even plausibility, can there be for barring the claims of British or neutral subjects having liens or charges upon the vessel and at the same time allowing similar claims against the cargoes? I can see none. Accordingly, upon authority and principle, inasmuch as the claims of Schröder and Co. and Brandts and Co. are founded upon their positions as pledgees, and not legal owners, they cannot, in my judgment, be allowed.

But it is argued that, although the claimants were not the legal owners of the cargoes, they had such a beneficial interest therein that their claims should be allowed. To accede to this proposition would be to open a door for all sorts of inquiries and calculations which has been

consistently and firmly closed by my predecessors and by courts of prize. In the initial stage how would a captor, who may have had good reason to believe that the cargo seized was enemy property, know how to act if he had to consider before seizure, or knew that he might be confronted after seizure with, claims from pledgees, as moneylenders in various parts of the world, whose advances might be either 5 per cent. or 95 per cent. or any other proportion of the value of the goods, or if he might be subject to the taking of a general account as between banker, or customer, or guarantor of customer, in order to ascertain the extent of the alleged charge or lien? The claimants have rights of action against their customers for their full claims, which they can set in motion either during the war or after it. How far they might be fruitful is no concern of this court.

The only safe guiding principle is to ascertain who are the legal owners of the cargoes, and if the goods are found to be the property in law of an enemy to condemn them, or if they are the property of neutrals or British subjects to release them, as was done in the *Miramichi*.

There is one other matter relating to the second case. Counsel for Brandts and Co. contended that in regard to part of the cargo claimed (2,834 logs) both Küpper and his guarantors, the Rheinische Credit bank Filiale, Karlsruhe, had before the outbreak of hostilities and capture refused to take up the bills of lading, and that thereupon the pledgees could have sold. Even if the fact of refusal were established, it is clear that until the pledgees did sell the general property in the goods remained in the owners, who had at any time the right to redeem. I may further note that the facts upon this head were precisely similar in the *Carlos F. Roses* (177 U. S., 655)—the statement of them is to be found at page 679 of the report.

My judgment, therefore, is that in none of the forms suggested can the claims in either case be allowed; and I must condemn the cargoes in both cases as lawful prize.

THE TERGESTEA.

Decided January 25, 1915.

(*The Times* Law Reports, Vol. 31, p. 180.)

In a prize court the rights of the captor take precedence over claims for necessaries, even where the claimants for necessaries have arrested the vessel before she was seized as prize.

This was an Austrian steamship which was arrested at Sunderland at

the suit of claimants for necessaries, and could not or was not allowed to leave England on the outbreak of war before the days of grace allowed under the Hague convention expired. Subsequently the Crown sought the detention of the vessel, but one of the claimants for necessaries interposed a motion for judgment and execution.

Held, that the captor's rights take precedence of other claims, even such as those of bottomry bond holders or mortgages, and *a fortiori*, therefore, of claims for necessaries. It was true that the necessaries claimants had arrested the vessel, but that only gave them security for such sums as they would be able to establish were due in their actions. It did not prevent the Crown from seizing the vessel. The vessel was ordered detained and all further proceedings in the necessaries actions stayed until further order.

THE CUMBERLAND

Decided February 1, 1915.

(*The Times* Law Reports, Vol. 31, p. 198.)

In this case the Crown claimed the condemnation of a cargo of 30,000 bags of nitrate shipped on the British vessel *Cumberland* in Chile and consigned to Hamburg. The cargo was condemned, and the case stood over for further argument on a claim by the ship owners for compensation whilst the ship was being detained at Liverpool. It appeared that the *Cumberland* put into Falmouth on November 27th when the cargo was seized as prize, but as there was no market for the nitrate, and no facilities for discharging it in Falmouth, the Admiralty marshal advised that the vessel should go on to Leith, Liverpool, or Glasgow, and the owners accordingly sent her on to Liverpool, where she arrived on December 13th. Owing to the congestion in the port of Liverpool it was found impossible to find a discharging berth, and although the cargo was sold on January 20th, it having been condemned by the prize court on the 18th, it still remained "warehoused" in the vessel until January 30th, when she was ordered to Garston, where presumably the cargo would be discharged. The shipowners submitted that by reason of utilizing the vessel as a store ship until the cargo was sold heavy warehousing expenses were being saved, and that they should be paid £10 per diem plus all port charges during the period of detention.

Held, that the shipowners are not entitled in law to compensation for the detention of the ship, but the court may authorize the Admiralty marshal to give them a reasonable sum out of the proceeds of the cargo.

War Obviated by an International Police. A series of Essays, written in various countries. The Hague: Martinus Nijhoff. 1915. pp. iv, 223.

As the war drags on, two facts become clearer and clearer: first, that competition in armaments, and therefore periodic war, will go on, unless a firm league of nations competent to prevent war by force can be created when the war ends; and secondly, that this indispensable league need not contain any large number of nations, because a moderate enlargement of the nations now fighting under the title of the Entente Powers or Allies,—as, for instance, by the addition of the United States and of a group of the Balkan States, or of Belgium, Holland, and Scandinavia,—would possess force enough to deal with any single nation, or probable group of nations, which might attempt aggressive warfare.

The little book published by Nijhoff at The Hague, containing a series of essays and speeches written in Holland, Finland, the United States, Austria, France, Germany, and Great Britain brings out the principles which underlie the establishment of such an International League and the creation of an international police, and shows that these principles have been under consideration by statesmen, military authorities, and professors of law for several years past, and have been discussed in seven different countries, both before and since the outbreak of the present war. No one can read this small book without being convinced that no reduction of armaments is possible without the creation of an international force which will command the confidence of each and every nation—confidence that each single nation will be safe against military aggression, and in most cases much safer than it could make itself by any military system and armaments possible for that nation alone. Again, one will be convinced by the testimony given in this book that no permanent peace can come out of international law as it is, or as it can be developed, unless an effective sanction be provided for international law, like the sanction which all experience proves is indispensable for municipal law. As Bourgeois wrote in 1910, "The security of rights is the first thing that must be organized. * * * Those who wish for peace must create and guarantee law between nations as between individuals."

The International League and the International Police are literally the only method of creating and guaranteeing law between nations.

When one says, therefore, that the creation of an International League, ready to use an overwhelming combined force—military and naval—is impossible, or academic, or unworldly, he must be resigning himself to the continuance of the state of things in Europe which has caused the material destructions and the moral and spiritual catastrophes of the past year. He despairs of Europe and almost of civilization itself. He consents to the destruction of the small nations, and anticipates the parcelling out of the world among a few great Powers, each occupying a huge territory, and each becoming of necessity a strong military and naval Power, always ready to grapple with a rival with the utmost possible destructiveness and frightfulness. Such huge states would all have to imitate the present German Empire, in keeping every national interest—education, commerce, manufacturing, and agriculture—under a central despotic control. The German ideal of the state involves the complete subordination of the individual, the extinction of the individual's "pursuit of happiness," and the substitution of compulsion for liberty, and of driving for leading in every sphere of life and in every occupation. Surely the people that resign themselves to such a conception of the future Europe or the future world have no right to call themselves moral idealists, or to assume that they are the effective friends and supporters of freedom, justice, and mercy. In imagination they are abandoning liberty and justice as political ideals, just as the Germany of the last fifty years has abandoned them in both theory and practice.

The courageous and hopeful course, on the contrary, is that pointed out by van Vollenhoven in 1910: "The whole project of an International League and an International Force must be fully thought out, its execution prepared systematically, and its consequences examined and clearly stated." The expedient limits of the International League need to be thoroughly studied in the light of the present war experience of the last twelve months, an experience which contains many elements of novelty and surprise.

The unanswerable argument for an International Police was clearly stated by van Vollenhoven in May, 1913, in speaking of the unsatisfactory results of the Peace Conferences at The Hague and of the treaties which resulted therefrom: "As long as we have no executive to enforce these treaties, but only voluntary observance from conscientious mo-

tives, there can be no kind of disarmament, even on the most limited scale." More than five years ago, ex-President Roosevelt said at Christiania, Norway: "It would be a master stroke if those great Powers honestly bent on peace would form a League of Peace not only to keep the peace among themselves, but to prevent by force, if necessary, its being broken by others." May we not hope that at the close of this terrific war some statesmen, soldiers, and scholars will be found competent to deal this master blow for humanity!

CHARLES W. ELIOT.

The Diplomacy of the War of 1812. By Frank A. Updyke, Ph. D., Professor of Political Science at Dartmouth College. Baltimore: The Johns Hopkins Press. 1915. pp. 504. Cloth $2.50.

The diplomatic events connected with the War of 1812 with Great Britain have been quite fully reviewed and discussed by a number of American writers, among whom may be mentioned Henry Adams, Admiral Mahan, McMaster, Schouler, Woodrow Wilson, Goldwin Smith, and Albert Bushnell Hart; but Professor Updyke is entitled to the credit of having produced the most complete and detailed narrative extant of these events, supported with a voluminous citation of official documents and authorities, which will prove invaluable to the students of this important portion of American history.

The two leading causes which brought on the war—impressment of seamen and neutral trade—are the subjects of the first two chapters. They are treated with a necessary length of detail, which will prove tedious to the general reader, but useful to the student. The chapter which relates to the American peace commissioners will be found more interesting, as it gives a sketch of the character and services of five of the most prominent of the statesmen of their day. An extract from the sketch of John Quincy Adams, the chairman of the American commission, will indicate the author's style of treatment:

> Adams's talents and education, no less than his remarkable experience, fitted him admirably for his position upon the peace commission. His thorough knowledge of constitutional and international law; his conscientious devotion to high ideals; his indefatigable industry; and his ability as a writer of forceful English rendered him particularly fitted for his work. While possessing these excellent characteristics, Adams had others which were less commendable. He was easily provoked; rather ungracious in manner; lacking in sympathy with men of different character and training from himself; and utterly devoid of a sense of humor. These qualities, added to his cold intellectuality, isolated him from the fellowship of other men. * * * It was due to the characteristics which have been mentioned that during the period

of the peace negotiations Adams rarely appeared upon friendly terms with the other commissioners (p. 171).

After a sketch of the others, the author concludes that "the only common tie that existed between the members of the commission was that of loyalty to their country. * * * Every member of the mission save Bayard was personally disliked by one or more of the others" (p. 175).

Their dissensions continued not only through the negotiations, but were revived by some of them years after their return to the United States. Russell, then a member of the Congress, attacked Adams, then Secretary of State, regarding events during the negotiations, and Clay came to the latter's defense (p. 379). But notwithstanding the personal defects of the American commissioners, the author accredits them as far superior to their British colleagues, whom he characterizes as "second rate men"; and quotes the historian Henry Adams as asserting that "probably the whole British public service, including Lords and Commons, could not at that day have produced four men competent to meet Gallatin, J. Q. Adams, Bayard, and Clay" (p. 195).

The review of the instructions given the American commissioners is given quite in detail. Among them is one not generally known, and which impresses us as quite surprising in view of the little success gained by our armies during the war. A confidential article by the Secretary of State, not found in the public instructions, called the attention of the commissioners to the present and prospective evils growing out of a British possession on our northern frontier, and instructed them to propose a cession of Canada to the United States. It does not appear, however, that any serious attempt was made during the negotiations in that direction. On the other hand, it is seen that the British commissioners strongly urged during the negotiations that a large section, amounting to more than 3,000,000 acres, now included in the State of Maine, be ceded to Canada, in order to secure in British territory a direct route between Halifax and Quebec.

The author makes clear what is so often noticed in connection with the negotiations for peace, that the two irritating subjects of neutral trade and impressment, which had brought on the war, were passed over almost without discussion, and that the topics which caused the most consideration and violent debate in the conferences were those which had little or no influence in bringing on the conflict, among which were the territory of and trade with the Indians, the restitution of Louisiana, the rearrangement of the boundaries in accordance with the wishes of

Canada, the exclusive military control by Great Britain of the Great Lakes, the recognition of the principle of *uti possidetis* or the *status quo ante bellum*, and the attempted exclusion of the Americans from the northeast fisheries.

Probably the chief occasion for criticism in the book is the author's treatment of the alleged cause for the declaration of war against Great Britain. He says: "Impressment, one of the principal causes for which war was declared," (p. 60); and again: "Impressment, which was the principal cause of the war" (p. 437). There is no doubt that impressment was one of the most irritating questions between the two governments, and that when, after war was declared, it was found that the British Orders in Council had been repealed, impressment became the question about which the war was continued. But it is clear from an examination of the President's war message that the chief, if not the only, reason for the declaration of war was the supposed maintenance of the Orders in Council, and if it had been known that they were already repealed there would not have been a declaration of war.

This is the general judgment of the historians who have treated of the subject. When a few years earlier a British Minister arrived in Washington and it was understood that he was authorized to give assurance that the Orders in Council would be removed, Henry Adams records this assurance as the harbinger of reconciliation with England and adds: "Not a voice was raised about impressment," and he cites the report of the British Minister to his home government "that the Secretary of State was disposed to settle every other difference in the most amicable manner, provided his Majesty's Orders in Council are revoked." And referring to the President's declaration of war, Adams asserts that "no one could explain the reasoning which led to a war with England, on the ground selected by Madison, without a simultaneous declaration against France." Admiral Mahan's comment is that the government was precipitated "into a step for which, on the grounds taken, no justification existed," and that it "had been dragged at the wheels of Napoleon's chariot." Woodrow Wilson states that "Mr. Jefferson had let impressment go almost without protest. It was now clearly an afterthought as a ground for war. * * * The cause of the war was taken away on the very eve of its outbreak." [1]

[1] Henry Adams, *History of the United States*, ed. 1889, vol. 6; Mahan's *Sea Power in its Relation to the War of 1812*, ed. 1905, pp. 270–8; Woodrow Wilson, *History of the American People*, ed. 1902, vol. 3, p. 214.

No one can read Professor Updyke's book without being struck by the similarity of the controversy which brought on the War of 1812 with the present controversy in which the United States is engaged with the belligerent Powers of Europe over their interference with neutral trade. If we substitute the Kaiser for Napoleon, we have an almost exact parallel. The Berlin and Milan decrees, it was alleged, were occasioned by the violation by Great Britain of the principles of international law respecting neutral trade; and Napoleon is quoted as announcing that "the provisions of the present decree shall be abrogated and null in fact, as soon as the English abide again by the principles of justice and honor" (p. 86). So also we have the Kaiser informing President Wilson that the relentless submarine warfare will cease when Great Britain ceases to violate the laws of neutral trade in her effort to starve the women and children of Germany.

The author justly remarks in the conclusion of his useful work, in referring to the agreement for mutual disarmament on the Great Lakes, that this "has undoubtedly been the greatest single factor in the continuance of peaceful relations between the United States and Great Britain during the last one hundred years" (p. 465), which he styles a happy sequel to the insistence by the British commissioners in the peace negotiations that the United States alone dismantle its forts and withdraw its vessels from the lakes.

JOHN W. FOSTER.

The Doctrine of Intervention. By Henry G. Hodges, Harrison Fellow in Political Science at the University of Pennsylvania. Princeton: The Banner Press. 1915. pp. xii, 288. Cloth $1.50.

The author's definition says: "Intervention is an interference by a state or states in the external affairs of another state without its consent, or in its internal affairs with or without its consent." This definition appears to include, among other things, war of any sort and also treaty rights as to internal affairs, and to exclude treaty rights as to external affairs. Thus there is a departure from the definition in Hall's *International Law*, which says merely that "intervention takes place when a state interferes in the relations of two other states without the consent of both or either of them, or when it interferes in the domestic affairs of another state irrespectively of the will of the latter for the purpose of either maintaining or altering the actual condition of things within it." Variation in definition is natural, for the word is still used loosely.

The author takes the familiar distinction between political intervention and non-political intervention, saying that the former "results more especially from disagreements between the sovereign powers as to acts or policies affecting the dignity or the security of the opposing state or the general body of states," and that the latter "results, in the first instance, from the protection of citizens in some manner." To political intervention he devotes a chapter of about forty pages, and to non-political intervention, under the heads of protection of citizens, denial of justice, protection of missionaries, collection of contract debts, protection of humanity, persecuted Jews, and right of asylum, a chapter of about fifty pages. Then follows a chapter of about fifteen pages on "special forms of intervention," namely, recognition of belligerency, recognition of independence, recognition of insurgency, unneutral service, good offices and mediation, and consular and international courts. Then comes a chapter of about forty pages on non-intervention, under the heads of policy of the United States, policy of Europe in the Americas, and policy of Europe at home. The general discussion then concludes with a chapter of about twenty pages entitled "observations and conclusions." Then follow two chapters of about thirty pages each on intervention in Mexico and interventions in the European war. An appendix presents the neutrality proclamation of President Wilson, the correspondence of Senator Stone and Mr. Secretary Bryan on neutrality, and a bibliography, which does not purport to be complete.

The total result is a presentation much longer than that found in general treatises on international law and much briefer than that given in the numerous extracts found in the first three hundred and sixty-six pages of the sixth volume of Moore's International Law Digest. The book appears to be intended for the general reader, rather than for the student or the expert. It is surprising to read that "the United States intervened in Mexico in 1846" (p. 10); and the surprise is not removed by the explanation that "a state may intervene to regulate the internal affairs of another which, by reason of neglect or incapacity, has not controlled its citizens from doing damage or involving the internal security of the intervening state," and that "the fact that the Mexican Government allowed or ordered part of its military force to cross that boundary resulted in a skirmish between the armed forces of the two nations, and was a direct violation of territorial sovereignty from the American viewpoint, threatening the self-preservation of at least a portion of the country" (p. 24). Yet as the United States certainly did

interfere with the external affairs of Mexico without Mexico's consent, the case—like any other war—must be admitted to come within the author's definition. It is more difficult to bring within any definition of intervention the accidental descent of a German airship upon a French parade ground in 1913 and the French seizure of the airship (p. 25). If, however, the author has now and then treated as within the term intervention a case belonging elsewhere, the general reader will not complain and the expert will not be harmed. Indeed, perhaps it is well for the reader to discover thus that the word seems not to have a definite meaning and that the doctrines surrounding it have not yet been reduced to a science.

EUGENE WAMBAUGH.

Internationales Privatrecht. By Ernst Zitelmann. Munchen: Duncker & Hunblot. Vol. II. 1912. pp. xxxiv, 1025.

We have at last before us the concluding part (pages 609 to 1025 of Vol. II) of Professor Zitelmann's work on the Conflict of Laws. Volume I made its appearance in 1897; pages 1 to 608 of Volume II followed in 1903 and the rest in 1912.

The author's sole aim in this work was to establish a sound theoretical basis for the conflict of laws and to show the application of the principles thus developed to the solution of the problems arising in this branch of the law. He did not intend to write a treatise on the conflict of laws of Germany, nor a complete treatise on the conflict of laws in general. If the author had had in view the latter object, he should have added, he says, three other parts, devoted, respectively, to the conflict of laws of Germany, to the conflict of laws of other countries, and to the history of the conflict of laws.

Professor Zitelmann had become satisfied that no sound basis for the conflict of laws and no general principles, entitled to universal approval, could be found from a study of the existing systems governing the conflict of laws in the various countries, for the reason that these systems themselves in the last analysis rest upon theoretical considerations rather than upon conceptions of justice, and that a solid structure, therefore, could be erected only by a process of deduction from fundamental principles. The difficulty, however, is that none of the prevailing theories are adequate to furnish a secure foundation, for all of them, not excepting v. Savigny's theory concerning "the seat of the legal relationship," which has found so much favor, are based, in the opin-

ion of our author, upon mere assumptions and not upon principles that can be proved to be correct. But if the science of the conflict of laws is to emerge from the confusion which the many theories and systems have created, a legal basis must be found whose correctness will be admitted by all. According to Professor Zitelmann international law alone can furnish such a basis. It is only if all will look to international law as the source from which the principles of the conflict of laws must be derived either directly or indirectly, that the aim of the science, to bring about uniformity of decision in private litigation irrespective of the country in which it may arise, can be attained. From this viewpoint it follows naturally that the rules of the conflict of laws cannot be more fixed than those of international law upon which they depend, and that, therefore, in matters concerning which the rules of international law are not yet crystallized, those of the conflict of laws cannot be definitely ascertained.

Professor Zitelmann arrives at the following basic principle: "Private rights can be created with a well-founded claim to international recognition by that state only which possesses the general governmental control, recognized by the principles of international law, over the object with respect to which the subjective private law confers authority; and that state alone can revoke such private rights again" (Vol. I, p. 68). This principle is developed in the first part of Volume I and is followed by a consideration of the extent of jurisdiction with respect to persons and things, the conflicts arising therefrom, the effect of a change of nationality or domicile, of a plural nationality or domicile, of an absence of nationality or domicile, and of treaties, upon the different rights involved.

And what is the binding effect of the principles thus found? Being derived from international law they bind, according to Professor Zitelmann, in the nature of things only the states and not the inhabitants thereof; they obligate the states to give effect to them through legislation, but until this is done they are not rules of municipal law. In the opinion of Professor Zitelmann these rules should be deemed, however, to have the force of subsidiary law, in accordance with the presumptive intention of the states, and to be applicable, without direct legislative sanction, whenever there is a gap in the municipal law concerning the conflict of laws.

Our author distinguishes, therefore, sharply between those rules of the conflict of laws which have been enacted in a given state (*Innerstaatliches Internationales Privatrecht*) and the rules derived from international law

(*Überstaatliches Internationales Privatrecht*). In case of conflict the former must, of course, prevail in the enacting state.

The second part of Volume I takes up the "innerstaatliches" private international law and considers such topics as renvoi, the controlling effect of the will of the parties, public policy, and procedure.

The third part is entitled "Interlocal Private Law" and deals with the application of the principles of the conflict of laws in states where there is no uniform law governing all branches of private law.

Volume II contains the application of the general principles developed in Volume I. As the author is solely interested in showing the operation of his method, he does not deem it necessary to cover the entire field of private law. He omits, therefore, the subject-matter contained in the German Commercial Code and the Bills of Exchange Act and limits himself to the fields covered by the Civil Code. Originally he planned to deal also with the law of patents and copyright but this plan was abandoned in the end. In his treatment Professor Zitelmann follows the order of the Code and in the "General Part" deals with the different kinds of subjective rights, Persons, Things, Legal Transactions and the Protection of Rights, and in the "Special Part," with the Law of Things, the Law of Obligations, the Law of the Family, and the Law of Inheritance.

As to the merits of the work, it must be said at the very outset that it is a really great work. It possesses great originality, follows no beaten trail, but hews its own way through the maze which the many different systems and divergent theories concerning the conflict of laws have created. As the object of the work is the development of the author's personal viewpoint rather than the writing of a general treatise, he does not deem it worth while to give detailed references to the positive law of Germany or other countries, nor to the juristic literature upon the subject, both of which are considered only to the extent that the principal aim of the work seemed to justify. In this respect the work presents a sharp contrast to that of the late Professor v. Bar.

Throughout the work one is struck by the author's power of legal analysis, of clearcut definition, of precise statement, and of logical deduction. Having found international law to be the source of the rules of the conflict of laws, he derives from its recognized nature the fundamental rules and deduces from them in turn sub-rules and corollaries, making clear all the while the relationship which each rule bears to the other and to international law. In this manner he builds up a beautiful

system in which each part appears to be carefully correlated to the other. The superstructure having been erected, the author distributes the interior furnishings with skill and judgment. He traverses the entire field covered by the Civil Code and assigns to each element, rule, or institute its proper place in his system of the conflict of laws. In this part of the work, as in the preceding, the author seizes intuitively, as it were, upon the very central idea underlying the subject in hand and unfolds therefrom, with consummate skill, the consequences which in his opinion logically and inevitably follow. The work is in all respects a typical example of German legal scholarship at its best. Were Professor Zitelmann not known by his other writings, the present work would be sufficient to rank him with the foremost German jurists of to-day. In the history of the conflict of laws it must be placed alongside the famous treatises on the subject by v. Savigny and v. Bar. As a master of the technique of the law Professor Zitelmann is without a rival in the whole literature on the subject.

The broad foundation of the work, its liberal point of view, clear analysis and wealth of new ideas cannot fail to make it one of the most influential works on the conflict of laws. Although it is not a practical treatise, it throws such a flood of light upon all problems in the conflict of laws that the judges and lawyers of all countries should find it very helpful. It is written, moreover, in such a simple style that it can be read with genuine pleasure.

ERNEST G. LORENZEN.

The Collected Papers of John Westlake on Public International Law. Edited by L. Oppenheim, M. A., LL. D., Whewell Professor of International Law in the University of Cambridge. Cambridge: University Press. 1914. pp. xxix, 705.

Dr. Westlake, who might well be considered the "DOYEN" of English publicists in international law, both public and private, died April 14, 1913, after a long life of great distinction and usefulness. Shortly after his death the first edition of his *Chapters on the Principles of International Law* being exhausted, the Syndics of the University Press resolved to publish a collection of all his lesser contributions to public international law, embodying therein a new edition of these "chapters."

With the consent of Mrs. Westlake, Dr. Oppenheim, who succeeded Westlake in the Whewell Professorship, undertook the editorship of this compilation.

His work has been admirably done with judgment, learning and modesty, and the result is the present volume of 705 pages.

The French papers of Prof. Westlake are omitted for want of space, but are easily accessible, for the most part, in the *Revue de Droit International et de Législation Comparée.*

The collection is divided into two parts, the first consisting of the "Chapters on the Principles of International Law," and the second of all his other papers in the chronological order of their appearance.

Thus the intellectual life of Dr. Westlake is exhibited in its orderly progress. A valuable list of all his writings is appended and a careful index added. The papers are reprinted without alteration, except to correct misprints, and the addition of a few judicious notes by the editor, signed with his initials.

Westlake was a profound jurist who, as has been well said, never sought to evade difficult problems but faced them and "wrestled with them."

These essays, extending from 1856 to 1913, dealing very largely with topics of current interest in international law, are a valuable review of fifty-seven eventful years. They are the contemporary comment by as ripe and as just a mind as any which has addressed itself to that branch of knowledge, in the international incidents of over half a century. They contain discussions of situations which became acute, as blockade during our Civil War, as export of contraband and war supplies, during the Franco-Prussian War, continuous voyage during the South-African War; the Muscat Dhows Case in 1907, the Hague Conferences and the Declaration of London.

Many of the questions, agitated in those past years are revived by the present great war and are again burning questions, as those of blockade, export of contraband and continuous voyage.

For instance, Westlake dealt with the objections presented by a former Count von Bernstorf, then Prussian Ambassador at London, to the export of war supplies from England to France during the Franco-Prussian War. He absolutely establishes the validity of such export and the fact that like traffic in war supplies from Prussia to Russia during the Crimean War was extensive and habitual. The present writer recently in discussing, on the platform and in print, objections urged to such export from the United States to the Allies, had great satisfaction in quoting Westlake's facts and conclusions and in showing like extensive export of munitions of war from Germany to Eng-

land during the South African war, which was in no way discontinued when the South African Republics were wholly cut off from access to the German markets, a situation identical with the present.

The above is but an illustration of the light which these masterly papers throw on the vital questions discussed at the present moment.

It is of interest to add that a like volume of Westlake's periodical contributions to private international law, in which his authority was equally prëeminent as in public international law, is in contemplation. This will complete the record of Dr. Westlake in these two great branches to which he devoted his long life and his markedly able mind.

The university, the editor and all who pursue these useful and elevated studies are to be congratulated.

CHARLES NOBLE GREGORY.

Science et Technique en droit privé positif. Première Partie (Position actuelle du problème du droit positif, et Eléments de sa solution). By François Geny. Paris: Recueil Sirey. 1914. pp. xiii, 212.

The stupendous accumulation of printed matter in this now much agitated world, is no doubt due to the fact that each writer and author (the two do not always mean the same person) finds it necessary to discover for himself what has in many successions been discovered by others. There is a certain degree of utility and even necessity in this method which need not be here further discussed. Much of what falls in this preliminary division of what promises to be a somewhat extended essay, evokes the thought just expressed; but it must be conceded, that just because the present contribution is only an introductory part, a large number of such re-discoveries could hardly be avoided in reaching a new point of view (at least in French law writing) which affects the entire subject of legal method, and at the same time involves the foundations of law and legal rules.

The essential ideas which lie at the base of these studies, as the author states, were announced in a conference paper read in 1910, under the title, *Les procédés d'élaboration du droit civil*, published in book form with other essays of other well known French authors as *Les méthodes Juridiques* (Paris, 1911). This work is a logical continuation of the *Méthode d'interpretation et Sources en droit privé postif*, whose publication in 1899 at once marked the author as a writer of great insight and unusual industry. It has long since disappeared from the shelves of the bookseller, but once in a while a second-hand copy can be bought for about

80 francs. The work is well known to scholars in America, but doubtless more by report than otherwise, since it is safe to say that there are not five and perhaps not three copies of it to be found on the North American continent. The learned author has been much importuned to offer a new edition, and a good deal of curiosity has been aroused as to why these requests have gone unheeded. An explanation is now apparently offered, and it does Geny credit. While he hopes to be able to revive the book, he admits with a frankness, unusual to authors, that it contained radical infirmities in its conclusions. Along with this refreshing statement, which doubtless relieves the conscientious author's troubled mind, the wise critics are made to suffer. They did not see the gaping holes, and found fault with what was faultless. Thus perish the wicked.

The earlier work dealt with the sources of the law; the present study deals with its method. He proposes that jurists should "reject freely and decisively the illusion that written law embraces all the positive law in force." This form of statement is applicable to code countries. For us, he would, of course, change the formula to require that we put aside the illusion that case-law (added to early English Statute law) is all of the common law. There is no doubt much law which is not found in law-books. But what is law? Innocent is the question, but what mountains of controversy have been raised to answer it! From before the Vedas and steadily onwards jurists and philosophers have cast their divergent answers into a formless heap. Another attempted solution will do no harm, and by a lucky stroke perhaps may solve the riddle. According to Geny, it is "the totality of rules by which the external conduct of man in his relation to fellow-men, is governed, and which, under the inspiration of the natural idea of justice in a given state of collective human consciousness, appearing susceptible of a social sanction (coercitive if need be), are, or tend to be provided with a similar sanction, and already assume under the form of categorical commands to dominate particular wills for the purpose of bringing about order in society." Not a review, but a tome would be necessary to dispose of this long definition; but the most characteristic ingredient of this compound may shortly be separated from the rest for brief examination. Geny has a fondness for the phrase "equilibration of interests." These interests are to be balanced for the maintenance of human progress by the law, the principal content of which is justice. Law is only a branch of morals under a social aspect, or in the words of Jellinek the "minimum of ethics." Geny seems to approximate the position of Stammler whose name ap-

pears repeatedly in his references, but this is only conjecture, since Geny's concept of justice is of something "indefinable" and "irreducible." Where a mystery is desired, this one will be found quite satisfactory.

The most interesting and valuable portion of the present contribution is that which treats the topic, juridical epistemology. There has been until most recently a real vacancy in juristic literature exactly conterminous with this field of investigation, strange as it may seem that there could be any phase of legal thought which has not been explored from every point of the compass. Apart from the very solid essay of Wurzel,[1] and the earlier study of Rümelin,[2] and a few fragments locked up in books and essays principally of another intent, and especially among a few of the logicians, the ground was untrodden; and Geny may be welcomed here as possessing the right type of mind to look under the surface of things, and to discover the hidden roots of legal method. That these inquiries have been uncongenial to the man of law is due to the fact that here it is necessary to find a starting-point outside the law and especially in psychology.

The lawyer has been accustomed from time immemorial to regard the law as self-sufficient to solve not only its own problems, but even the problems of the other sciences where they come into contact in any way with the law machine. The law has independently constructed its own systems of ethics, economics, and psychology, and these systems are also authoritative even against the real facts. In this respect they have a genuine advantage over the systems of ethics, economics and psychology which admittedly are only hypothetical.

The field of legal method is much broader than that required merely by the application of an Aristotelian logic, to legal concepts. This fact was explicitly stated by Judge Holmes many years ago, but unfortunately he did not stop to tell us any more about it. Whether he saw the problem in its important bearings, is not even clear. Logic does not make its appearance in the law until a relatively late stage of legal growth, and even then, due to the large element of discretion which cannot be banished from any legal system, it must struggle for its existence with much that is illogical and even irrational. Geny shows that the rules of law originate in a supra-sensible atmosphere, in a conflict "of emotions, sentiments, or tendencies (desires, inclinations, feelings), of beliefs, wills, instincts, habits; in a word, of psychological realities

[1] *Das Juristische Denken*, Vienna, 1904.
[2] *Das Juristische Begriffsbildung*, Leipzig, 1878.

which are translated in needs or interests of an economic, moral, religious, etc., nature."

It is yet too early to speak in terms of praise or reproach of what Geny has accomplished in this new undertaking; since he has but stated the elements and foundations of his problems. We may, however, entertain the most lively expectations concerning the next issues of this work. It seems to be characteristic of the science of the day to proceed from a kind of pluralistic standpoint. This attitude at least has the merit that it tends to avoid the one-sidedness which frequently extends a truth to the limits of disproportion. Such seems to be the method of work of the author. In his special inquiry, much of what must be resolved turns upon the poles of intuition and intellectualism. The intervening stretches are inhabited by such tribes as the Bergsonian philosophers, at one extreme, and the "law is logic" Eskimos at the other. A figurative moderation might select the equatorial belt as true line of juridical reality, but the temperate zone will be found elsewhere. If a word of criticism or suggestion were offered, one might say that as an element of legal method, Geny has made entirely too little of teleology. The word itself is found only once (p. 137) in this introductory essay, and then it appears that teleology is to be a pendant of intuition. We should regard it as a serious scientific defect if the rôle of teleology in the subsequent elaboration of the thesis of legal method is to be thus summarily disposed of.

ALBERT KOCOUREK.

Della Condizione Giuridica Delle Societa Commerciali Straniere. By Mario Marinoni. Rome: Athenaeum. 1914. pp. xi, 235, Lire 5.

This study of the legal position of foreign commercial associations in Italy, particularly as affected by Articles 230 to 232 of the Italian Code of Commerce, is of very considerable length and bears every evidence of serious and careful preparation: however, the reader who approaches it with the expectation of obtaining a general idea of the attitude adopted by the lawmakers and the courts of Italy towards foreign corporations, the powers and privileges and disabilities of such companies in practice, is doomed to disappointment.

It is in fact an examination scientific in a somewhat narrow sense and almost microscopic of three or four sections of the Code of Commerce prescribing the formalities by way of publication and record necessary in order to enable a foreign company or partnership to operate in Italy.

Conciseness and brevity are not among its merits, and it is not clear that these qualities have been sacrificed to any higher end, or that clarity and charm have been achieved.

A very considerable part of the essay is devoted to the support of the thesis that the rules by which one nation adopts and applies the laws of another to govern certain relations, for example, the status of subjects of that foreign nation, or, more particularly, the existence and powers of foreign corporations or artificial entities, are not properly speaking rules of private international law, but are in real fact an adoption or writing into the municipal law of the nation of sections of a foreign statute, to be applied to the particular conditions indicated. Thus, no law can in truth have any operation beyond the borders of the state which enacts it; if it appears to have such operation it is because the second nation has reënacted the same provision (not perhaps explicitly but by effect of a general rule) to govern in certain circumstances.

This is, of course, an admissible position, and the conception may have its value, but it seems to be more a point of view than a principle, and in any case if the point, which, as stated, takes up a large part of the essay, had been either assumed or ignored, there is little reason to think that the succeeding section, which alone has any reference to the title, would have been essentially different.

The gist of the Code provisions to which reference has been made is that companies duly constituted in a foreign country, and which establish in Italy a secondary place of business or representative agency, are made subject to the prescriptions of the Code as to the filing, recording, posting and publication of the articles of incorporation and by-laws, of amendments introduced into them, and of regular balance sheets: and that the names of the persons directing or managing such branches or agencies must be duly published. Failure to comply with these dispositions incurs certain penalties prescribed for domestic associations and particularly makes the directors and representatives liable jointly and severally for all corporate or partnership obligations. Finally all partnerships, general or special, must file their articles of copartnership in the proper Court of Commerce.

The questions of construction which Professor Marinoni raises and decides in general with entire good judgment and legal sense are of such a nature that when they present themselves in practice they will probably be determined by administrative officers or by judges without great regard to the theoretical foundations which are here laid down

with so much care, and rather on grounds of practical utility and broad principle. It may be fairly said that just on that account there is more reason that the work on foundations should not be neglected: and in the Latin countries at all events, the balance is fairly preserved between the conception of law as the result of a mass of judicial decisions and law as a deduction from eternal principles. Perhaps the countries deriving from the English law incline too much to the first conception. At all events it is safe to say that in the United States such studies as the one under review, unless of entirely exceptional quality, could not be expected to produce any practical effect, direct or indirect. This is perhaps not true in the same degree of Italy or the Latin countries generally: but what is certain is that there the legal mind busies itself with the laws and principles of jurisprudence to an extent that is unknown with us, and this activity and interest must appear admirable even when its results may be thought comparatively unimportant.

JAMES BARCLAY.

Foreigners in Turkey: Their Juridical Status. By Phillip Marshall Brown. Princeton University Press. 1914. pp. vii, 157. $1.25.

It is believed that international law is best treated in monographical form. It is too much to ask that ordinary persons should be familiar with international law as a whole and in all its details, and to write with equal ease and accuracy upon the system and all of its parts. Now and then students who feel attracted to a particular field are minded to treat it at length and in tender detail. The result may and will be very valuable, if in addition to academic familiarity with the subject the writer has had practical experience. It is to be hoped that persons interested in international law in this country will follow the good example set by Professor Brown in the little book under consideration, who has treated the very difficult and complicated subject of the juridical status of foreigners in Turkey with that ease and grace and persuasiveness which can only happen when theory and practice go hand in hand. Professor Brown was Secretary and Chargé d'Affaires of the American Embassy in Constantinople, and was called upon to consider practically and professionally the questions which he discusses in his attractive and very enlightening monograph.

The monograph consists of five chapters dealing respectively with the origin of the rights of foreigners; the Capitulations; the juridical rights of foreigners (Chapters III and IV); and the immunities of jurisdiction

and international law. The appendix contains the regulations of June 18, 1880, enforced in the Consular Courts of the United States in the Ottoman dominions, and a selected bibliography; and the work itself closes with a very serviceable index.

The subject of Professor Brown's book is highly technical and appeals to a special and therefore a limited class. The discussion, however, is general, and of interest to anyone who cares to see how the relations of foreigners in a country of different civilization, ideals and methods of procedure, have been arranged and determined.

Professor Brown's chapter on the origin of the rights of foreigners, which he prefixes as an introduction, is very enlightening, as it shows how alien peoples coming together have been allowed to retain their laws and to have their actions tested by them; that is to say, how law was regarded as personal, traveling with the person and controlling his actions, instead of territorial, in the Anglo-Saxon sense of applying to all persons irrespective of nationality within the political boundaries.

The examples which Professor Brown cites show it to have been the custom in the Orient to grant immunity to foreigners; that the conqueror of Constantinople followed the practice instead of having it imposed upon him, and that he was especially inclined to do so by reason of the difference between the law of the Koran applying to Mohammedans and the laws of non-Mohammedan countries. "The essential fact," Professor Brown says, "to be noted is simply that the Turks in the midst of a great triumph spontaneously and generously recognized the right of the conquered to be governed by their own laws and customs in matters held sacred by the Moslems, as well as in matters not of vital concern to the state" (p. 23). And he concludes his first chapter with a paragraph which deserves quotation, as it not only shows Professor Brown's point of approach, but also his sympathy with that much despised and hard pressed person, the unspeakable Turk:

> Whatever may have been the reasons and motives guiding the Ottoman Turks in their policy towards their non-Moslem subjects, whether of tolerance, statesmanship, or practical necessity, it is sufficient for the purpose of determining the origin and nature of the exterritorial privileges of foreigners in Turkey, simply to note in this connection that, without the aid of powerful armies or battleships, the Christians and other subjects of the Sultan received extensive immunities of jurisdiction resembling in certain respects those subsequently granted to foreigners (p. 24).

Passing to the question of Capitulations, Professor Brown calls

attention to the confirmation, only a few days after the capture of Constantinople, of the exterritorial privileges previously enjoyed by the Genoese of Galata under the Greek Emperors. And on this point he says:

> It is of special interest to note that the political and commercial privileges conceded to the inhabitants of Galata were quite analogous to those granted to the merchants of Genoa by the Sultan of Egypt in 1290. In other words, the confirmation by Sultan Mohammed of the ancient privileges enjoyed by the Genoese under the Greek Emperors, was not merely a special, isolated act of a novel character, or the recognition simply of an old custom which the Turks by reason of their reverence for custom in general might have felt constrained to recognize. It was rather the acknowledgment of the general practice of the times,—a conformity to the accepted rules of international intercourse (p. 28).

If, however, the act of Mohammed the Conqueror can be regarded as a domestic act in confirming the rights of the Genoese, the recognition of the rights of the Venetians within a year thereafter [April 15, 1454] can only be regarded as an international act, because the rights of the Venetians resulted from a treaty concluded at Adrianople, and Professor Brown considers this treaty as of very great importance as "the precursor, if not the prototype, of those later agreements between Turkey and other nations, commonly termed Capitulations" (p. 29). The fact is, however, that the two treaties standing out beyond all others in the matter of the Capitulations are the treaty of 1535 between Sultan Soliman and Francis I of France, and that of 1740 between Turkey and France; and just as the treaty of 1535 has inured to the benefit of the countries generally, so have the provisions of the treaty of 1740 likewise inured to the benefit of the countries with interests in Turkey. As Professor Brown expressly says, "it may be said that France first obtained for the rest the main immunities of jurisdiction claimed by all the Powers in subsequent treaties; and that all, through the most-favored-nation clause, secured the mutual benefit of those special privileges obtained by any individual nation" (p. 41). The United States is one of the beneficiaries of the French treaties, and claims and exercises jurisdiction in the Ottoman Empire in accordance with the Treaty of 1830 between the two countries.

Chapters III and IV are an analysis of the juridical rights of foreigners under the express wording of the treaties and according to the customs which have grown up. It would be difficult to summarize this discussion, as the subject is wholly technical and would require much space. It is,

however, necessary to call attention to Professor Brown's views contained in Chapter V, and with which he concludes his monograph.

He believes, and rightly, that the system obtaining in Turkey, by which foreign governments exercise jurisdiction upon Turkey's soil, is humiliating, and that there should be reached with Turkey adjustments "in regard to the protection of foreigners, with due respect to the sovereign rights of Turkey as an independent, equal state in the family of nations" (p. 112). He thus regards, and it would appear rightly, the system of Capitulations as a stage of transition destined to disappear in the course of time, and that steps should be taken in order to reformulate the rights of foreigners in such a way as to be compatible with the dignity of Turkey. His recommendations are:

"I. According to the basic principles of international law, Turkey should have exclusive jurisdiction over foreigners, as well as natives, in all matters affecting public law and order in the Empire. This is essentially a fundamental right of independent sovereignty" (p. 112).

"II. Given the difference between Moslem jurisprudence and other systems of law, it is impossible for Turkey to enter into an international agreement 'defining the rights of foreigners in respect to personal status and civil capacity'" (p. 113).

"IV. The way out of the dilemma would seem clearly to lie in a frank recognition of the desirability of leaving to the exclusive jurisdiction of the consular courts all questions regarding foreigners which do not in any way affect the public law and order of the Empire" (p. 114). "It would mean," Professor Brown says, "simply the perpetuation of the existing consular courts with considerably restricted powers of jurisdiction; and a clear delimitation of the respective spheres of these tribunals and Ottoman courts. Turkey could then feel that the presence of these foreign tribunals was no longer in derogation of its sovereign rights" (p. 118). Professor Brown believes that such an agreement is possible and that it would be satisfactory to Turkey, and that, "recalling with pride that the privileges voluntarily and generously granted to foreigners and Christian subjects alike, were granted when the Turks were at the height of their military power, the descendants of the race of Osman might well claim with equal pride that the continuation of these greatly modified immunities of jurisdiction might properly be regarded, as suggested in the introduction, 'as evidence of a more enlightened and more liberal interpretation of the law of nations than has yet been granted in

Europe, the place of its origin, though not of its exclusive development or application'" (p. 118).

It is difficult, however, to believe that a nation would voluntarily submit to the establishment of consular courts, sitting in its territory and exercising jurisdiction in matters concerning foreign residents provided the public law and order of the Empire were not involved. A nation submits to such inroads upon its sovereignty and its legitimate exercise only when forced to do so, and takes advantage of any opportunity likely to succeed to get rid of this badge of inferiority.

Turkey naturally wishes to be mistress of its own household, and shortly after the outbreak of the great war denounced the Capitulations, as appears from an editorial comment in the JOURNAL for October, 1914 (Vol. 8, p. 873):

> The Department of State was officially informed by the Turkish Ambassador on September 10, 1914, that on and after the first of October the Ottoman Government had determined to abrogate the conventions known as the "Capitulations" which he stated "restrict the sovereignty of Turkey in her relations with certain Powers." The United States is one of these Powers. It was further stated that "all privilege and immunities accessory to these conventions or issuing therefrom are equally repealed." The purpose was to remove "an intolerable obstacle to all progress in the Empire," and the relations of Turkey to the Powers were to be regulated henceforth by "the general principles of international law."

It seems unwise to speculate as to the future of the Capitulations, as their future may depend upon the future of Turkey, which at present seems to hang in the balance. But, however that may be, Professor Brown's book is a good book and shows the interest with which a subject making a limited appeal may be invested where its writer is the master of his subject and is possessed of an easy, clear and graceful style.

JAMES BROWN SCOTT.

PERIODICAL LITERATURE OF INTERNATIONAL LAW

[For Table of Abbreviations see Chronicle of International Events, p. 721]

Aeronautics. Liberté de la navigation aérienne et suppression de la réglementation internationale des zones d'interdiction. *Franz-Reichel.* Clunet, *42*:1216.

Aliens. Alien enemy litigants. *Arnold D. McNair.* Law Q. R., *31*:154. April.

———. Amerikanische Union und die Einselstaaten, namentlich in bezug auf die kalifornische Frage, Die. *Richard Cahen.* Z. f. Völkerrecht, *8*:134.

———. Companies and enemy share-holders. *James Edward Hogg.* Law Q. R., *31*:170. April.

———. Control of enemy property and the status of alien enemies. Econ., *80*:137. Jan. 23.

———. Trading with the enemy. *G. G. Phillimore.* J. of Soc. of Comp. Legis., *15*:17. Jan.

Armaments. International control of armaments. *Sir Robert Laidlaw.* Contemp., *107*:457. April.

———. Problem of national defense, The. *Lindley M. Garrison.* N. Amer. R., *201*:833. June.

———. Wirtschaftliche Rüstung der Schweiz, Die. *Paul Gygax.* Arch. f. Sozialwissenschaft und Sozialpolitik, *40*:454. Jan.

Balkans. Balkan states and the war, The. Quart. R., *223*:424. April.

———. Greuel der beiden Balkankriege, Die. *Albert Thumb.* Deutsche Runds., *162*:150. Jan.

———. Oesterreichis Balkanpolitik im Urteil eines russischen Staatsmanner. *Wolfgang Windelbrand.* Deutsche R., *40–2*:83. April.

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———. Tagebuch eines belgischen Soldaten, Das. Süddeutsche Monats., *12*:49. April.

Blockade. *See Maritime Law.*

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———. Bulgaria and entente diplomacy. *E. J. Dillon.* Fortnightly, *97*:755. May.

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China. Causes and nature of the Japanese demand on China, The. *By Imperialist.* Fortnightly, *97*:1026. June.

———. Final expulsion of Germany from China. *By Imperialist.* Fortnightly, *97*:733. April.

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———. Japan and China. Economist, *80*:424. Feb. 27.

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